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SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1963

No. 292

**MISSOURI PACIFIC RAILROAD COMPANY,
PETITIONER,**

vs.

ELMORE & STAHL

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

**PETITION FOR CERTIORARI FILED JULY 19, 1963
CERTIORARI GRANTED OCTOBER 14, 1963**

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 292

MISSOURI PACIFIC RAILROAD COMPANY,
PETITIONER,

vs.

ELMORE & STAHL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

INDEX

Original - Print

Record from the 107th Judicial District Court of
Cameron County, Texas

Plaintiff's original petition A 1

Defendant's first amended original answer E 4

Plaintiff's first amended original petition H 6

Statement of facts, March 27, 28, 29 and 30, 1961 1 9

Appearances 1 9

Stipulation as to and offers in evidence 2 10

Testimony of John Fillpot—

direct 8 11

voir dire examination 13 14

direct 15 16

cross 18 17

redirect 49 36

recross 51 37

RECORD PRESS, PRINTERS, NEW YORK, N. Y., DECEMBER 10, 1963

Record from the 107th Judicial District Court of
Cameron County, Texas—Continued

Statement of facts, March 27, 28, 29 and 30,
1961—Continued

Testimony of Edward Baker—

direct	52	38
cross	87	56
redirect	156	80

S. D. Robinson—

direct	170	86
cross	183	84

J. A. Friend—

direct	185	84
cross	209	94
redirect	221	100

Herbert Hulse—

direct	221	101
voir dire examination	239	111
direct	243	113
cross	282	121
redirect	320	135

B. G. Slay—

direct	328	137
cross	351	147

Defendant's objections concerning jury note	364	153
---	-----	-----

Reporter's certificate (omitted in printing)	368	155
--	-----	-----

Plaintiff's Exhibits Count I	370	157
------------------------------------	-----	-----

P-1—Uniform Straight Bill of Lading from Elmore & Stahl at Rio Grande City, Texas, June 12, 1958	370	157
--	-----	-----

P-2—Diversion Order—Elmore and Stahl, dated June 13, 1958	372	169
--	-----	-----

P-4—Account Sales, made by La Mantia Bros. Arrigo Co., #60072, for Honey-Dews	373	171
--	-----	-----

P-5—United States Department of Agriculture Inspection Certificate, Market, Chicago, Number I-32289, dated June 18, 1958	374	173
--	-----	-----

Charge of the Court and verdict of the jury	375	174
---	-----	-----

Record from the 107th Judicial District Court of
Cameron County, Texas—Continued

Defendant's motion for judgment, motion to disregard findings, motion for judgment non obstante veredicto and motion to require reinitur	393	189
Motion for judgment	405	198
Judgment	406	199
Defendant's amended motion for new trial	423	212
Order overruling defendant's amended motion for new trial	426	215
Notice of appeal	427	216
Record from the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, San Antonio	427a	217
Appellant's motion for rehearing, including motion for findings of fact and conclusions of law	428	217
Appellee's motion for rehearing	439	226
Opinion on motion for rehearing, Murray, Ch. J.	440	227
Judgment on rehearing	449	235
Orders overruling motions for rehearing	450	236
Proceedings in the Supreme Court of Texas	451	237
Opinion, Walker, J.	451	237
Judgment	460	244
Order overruling motion for rehearing	462	246
Order allowing certiorari	463	246

[fol. A]

**IN THE 107TH JUDICIAL DISTRICT COURT
OF CAMERON COUNTY, TEXAS**

No. 37410-A

ELMORE AND STAHL

vs.

MISSOURI PACIFIC RAILROAD COMPANY

PLAINTIFF'S ORIGINAL PETITION—Filed September 28, 1959

To the Honorable Judge of Said Court:

Now comes Elmore and Stahl, plaintiff, complaining of Missouri Pacific Railroad Company, a common carrier with an office and place of business in Cameron County, Texas, hereinafter called defendant carrier, and for cause of action, plaintiff alleges:

Count I.

1. That on or about June 12, 1958, plaintiff delivered to defendant carrier at Rio Grande City, Texas, 640 crates of Honeydew Melons in good and marketable condition, loaded in Car ART 35042 and ultimately consigned to LaMantia Bros. Arrigo Company at Chicago, Illinois, for which defendant carrier issued its uniform straight bill of lading, thereby acknowledging receipt of same in apparent good order and for itself contracted to carry same to its ultimate destination.

2. That had said produce been properly carried and promptly delivered to consignee at Chicago, Illinois, it would have been then and there of the market value of \$2240.00, but it was delivered to consignee in poor condition, in which condition such produce was then and there of the [fol. B] market value of only \$1423.75 to plaintiff's damage in the sum of \$816.25, with interest thereon from June 18, 1958, until paid, at the rate of Six (6%) per centum per annum.

Count II.

That on or about June 1, 1958, plaintiff delivered to defendant carrier at Rio Grande, Texas, 640 Crates of Honeydew Melons in good and marketable condition, loaded in Car ART 33450 and ultimately consigned to York & Whitney at Boston, Massachusetts, for which defendant carrier issued its uniform straight bill of lading, thereby acknowledging receipt of same in apparent good order and for itself contracted to carry same to its ultimate destination.

That had said produce been properly carried and promptly delivered to consignee at Boston, Massachusetts, it would have been then and there of the market value of \$3264.00, but it was delivered to consignee in poor condition, in which condition such produce was then and there of the market value of only \$2736.25 to plaintiff's damage in the sum of \$527.75, with interest thereon from June 8, 1958, until paid, at the rate of Six (6%) per centum per annum.

Count III.

That on or about June 16, 1958, plaintiff delivered to defendant carrier at Rio Grande City, Texas, 560 crates Honeydew Melons in good and marketable condition, loaded in Car ART 51395 and ultimately consigned to York & Whitney at Boston, Massachusetts, for which defendant carrier issued its uniform straight bill of lading, thereby acknowledging receipt of same in apparent good order and for itself contracted to carry same to its ultimate destination.

[fol. C] That had said produce been properly carried and promptly delivered to consignee at Boston, Massachusetts, it would have been then and there of the market value of \$1680.00, but it was delivered to consignee in poor condition, in which condition such produce was then and there of the market value of only \$1063.90 to plaintiff's damage in the sum of \$616.00, with interest thereon from June 25, 1958, until paid, at the rate of Six (6%) per centum per annum.

Count IV.

That on or about June 21, 1958, plaintiff delivered to defendant carrier at Pharr, Texas, 700 Baskets of Peppers in good and marketable condition, loaded in Car ART 52223 and ultimately consigned to Catio & Mascari at Indianapolis, Indiana for which defendant carrier issued its uniform straight bill of lading, thereby acknowledging receipt of same in apparent good order and for itself contracted to carry same to its ultimate destination.

That had said produce been properly carried and promptly delivered to consignee at Indianapolis, Ind., it would have been then and there of the market value of \$2800.00, but it was delivered to consignee in poor condition, in which condition such produce was then and there of the market value of only \$1901.45 to plaintiff's damage in the sum of \$898.55, with interest thereon from June 26, 1958, until paid, at the rate of Six (6%) per centum per annum.

That within less than Nine (9) months after delivery of said produce to defendant carrier, plaintiff filed its claim in writing with defendant carrier for the loss and damage [fol. D] resulting to and suffered by plaintiff, as aforesaid, but defendant carrier has, notwithstanding, wholly failed and refused to pay the damages claimed.

Wherefore, plaintiff prays that it have judgment for its damages, with interest thereon from the dates set forth, for costs of suit, and for such other and further relief as to the Court may seem just.

North, Blackmon & White, By Jack E. A. White, 418
N. Tancahua, Corpus Christi, Texas, Attorneys for
Plaintiff.

[File endorsement omitted]

4
[fol. E]

IN THE 107TH JUDICIAL DISTRICT COURT OF
CAMERON COUNTY, TEXAS

No. 37410-A

[Title omitted]

DEFENDANT'S FIRST AMENDED ORIGINAL ANSWER—

Filed September 20, 1960

To the Honorable Judge of Said Court:

Now Comes Missouri Pacific Railroad Company, Defendant in the above entitled and numbered cause and files this, its First Amended Original Answer and respectfully shows the following:

I

Defendant specially excepts to Plaintiff's Petition, and particularly to Count I, Paragraph 2; Count II, Paragraph 2; Count III, Paragraph 2 and Count IV, Paragraph 2 for the following reasons:

A) The words "properly carried" amount to no more than a conclusion and do not give facts or information sufficient to place Defendant on notice as to how or in what respect the shipment was not properly carried. Plaintiffs should be required to plead more particularly in such connection, and without the same, Defendant cannot plead and prepare its defense herein.

B) The words "promptly delivered" amount to no more than a conclusion and do not give facts or information sufficient to place Defendant on notice as to how or in what respect the shipment was not properly delivered. Plaintiffs should be required to plead more particularly in such connection, and without the same, Defendant cannot plead and [fol. F] prepare its defense herein.

C) The words "poor condition" amount to no more than a conclusion and do not give facts or information sufficient to place Defendant on notice as to how or in what respect

5

the shipment was in such condition. Plaintiffs should be required to plead more particularly in such connection, and without the same, Defendant cannot plead and prepare its defense herein.

Of each and all the above and foregoing exceptions Defendant prays judgment of the Court.

II

Subject to the foregoing pleas, Defendant denies all and singular the material allegations in Plaintiff's Petition contained, and says the same are not true in whole or in part; and of this it puts itself upon the country.

III

Again comes Defendant, and for further answer herein, subject to the above and foregoing pleas and in the event such answer is necessary, would respectfully show as to each count of Plaintiff's Petition:

1) That the damage, if any, in whole or in part, to said commodities upon arrival at final destination and at the time of delivery to the consignee, was the result of the nature of said commodities and the inherent vice thereof, to wit: they are of a perishable nature, and said Defendant is not liable therefor.

2) That the damage, if any, in whole or in part, to said commodities upon arrival at final destination and at the time of delivery to the consignee, was the direct result of acts or omissions of Plaintiff, or the servants and agents of [fol. G] Plaintiff, for which Defendant is not liable.

3) That Defendant furnished the carriage and such services for the protection of said commodities as Plaintiff requested under the terms of the bill of lading and any diversions or changes of orders filed by Plaintiff or Plaintiff's servants or agents with the agents of Defendant, in the usual time and manner and in a reasonable time and manner, and in accordance with the Perishable Protective Tariff applicable thereto, and fully discharge the duties and obligations incumbent upon Defendant by virtue thereof,

and is not liable for the damage, if any, in whole or in part, to said commodities.

Wherefore, premises considered, Defendant prays that Plaintiff take nothing by this suit and that Defendant go hence with its costs without day.

Missouri Pacific Railroad Company, Defendant,
Sharpe & Hardy, Its Attorneys, By: T. Gilbert
Sharpe, of Counsel.

[File endorsement omitted]

[fol. H]

IN THE 107TH JUDICIAL DISTRICT COURT OF
CAMERON COUNTY, TEXAS

No. 37410-A

[Title omitted]

PLAINTIFF'S FIRST AMENDED ORIGINAL PETITION—
Filed October 24, 1960

To the Honorable Judge of Said Court:

Now comes Elmore and Stahl, plaintiff, complaining of Missouri Pacific Railroad Company, a common carrier with an office and place of business in Cameron County, Texas, hereafter called defendant carrier, and files this their First Amended Original Petition, and for cause of action, plaintiff alleges:

Count I.

1. That on or about June 12, 1958, plaintiff delivered to defendant carrier at Rio Grande City, Texas, 640 crates honeydew melons in good and marketable condition, loaded in Car ART 35042 and ultimately consigned to LaMantia Bros. Arrigo at Chicago, Illinois, for which defendant carrier issued its uniform straight bill of lading, thereby acknowledging receipt of same in apparent good order and for itself contracted to carry same to its ultimate destination.

2. That had said produce been delivered to consignee in good condition at Chicago, Illinois, it would have been then and there of the market value of \$2240.00, but it was delivered to consignee in bruised, broken and decayed condition, in which condition such produce was then and there of the market value of only \$1423.75 to plaintiff's damage in [fol. I] the sum of \$816.25, with interest thereon from June 18, 1958, until paid, at the rate of Six (6%) per centum per annum.

Count II.

That on or about June 1, 1958, plaintiff delivered to defendant carrier at Rio Grande City, Texas, 640 crates of honeydew melons in good and marketable condition, loaded in Car ART 33450 and ultimately consigned to York and Whitney at Boston, Massachusetts, for which defendant carrier issued its uniform straight bill of lading, thereby acknowledging receipt of same in apparent good order and for itself contracted to carry same to its ultimate destination.

That had said produce been delivered to consignee in good condition at Boston, Massachusetts, it would have been then and there of the market value of \$3264.00, but it was delivered to consignee in a bruised, broken, and decayed condition, in which condition such produce was then and there of the market value of only \$2736.25 to plaintiff's damage in the sum of \$527.75, with interest thereon from June 9, 1958, until paid, at the rate of Six (6%) per centum per annum.

Count III.

That on or about June 16, 1958, plaintiff delivered to defendant carrier at Rio Grande City, Texas, 560 crates of honeydew melons in good and marketable condition, loaded in Car ART 51395 and ultimately consigned to York and Whitney at Boston, Massachusetts, for which defendant carrier issued its uniform straight bill of lading, thereby acknowledging receipt of same in apparent good order and for itself contracted to carry same to its ultimate destination.

[fol. J] 2. That had said produce been delivered to consignee in good condition at Boston, Massachusetts, it would have been then and there of the market value of \$1680.00, but it was delivered to consignee in a bruised, broken and decayed condition, in which condition such produce was then and there of the market value of only \$1063.90 to plaintiff's damage in the sum of \$616.10, with interest thereon from June 25, 1958, until paid, at the rate of Six (6%) per centum per annum.

Count IV.

That on or about June 21, 1958, plaintiff delivered to defendant carrier at Pharr, Texas, 700 baskets of peppers in good and marketable condition, loaded in Car ART 52223 and ultimately consigned to Catio and Mascari at Indianapolis, Indiana, for which defendant carrier issued its uniform straight bill of lading, thereby acknowledging receipt of same in apparent good order and for itself contracted to carry same to its ultimate destination.

2. That had said produce been delivered to consignee in good condition at Indianapolis, Indiana, it would have been then and there of the market value of \$2800.00, but it was delivered to consignee in a bruised, broken and decayed condition, in which condition such produce was then and there of the market value of only \$1901.45 to plaintiff's damage in the sum of \$898.55, with interest thereon from June 26, 1958, until paid, at the rate of Six (6%) per centum per annum.

That within less than Nine (9) months after delivery of said produce to defendant carrier, plaintiff filed its claims in writing with defendant carrier for the loss and damage resulting to and suffered by plaintiff, as aforesaid, but defendant carrier has, notwithstanding, wholly failed and refused to pay the damages claimed.

[fol. K] Wherefore, plaintiff prays that it have judgment for its damages, with interest thereon from the dates set forth, for costs of suit, and for such other and further relief as to the Court may seem just.

North, Blackmon & White, By: Jack E. A. White,
Attorneys for Plaintiff.

[File endorsement omitted]

[fol. 1]

IN THE 107TH JUDICIAL DISTRICT COURT OF
CAMERON COUNTY, TEXAS

No. 37410-A

ELMORE & STAHL

vs.

MISSOURI PACIFIC RAILROAD COMPANY

Statement of Facts.

APPEARANCES:

For the Plaintiff:

Messrs. North, Blackmon & White, Attorneys at Law,
419 North Tancahua Street, Corpus Christi, Texas, By:
Hon. Jack White, of counsel;

For the Defendant:

Messrs. Sharpe & Hardy, Attorneys at Law, P. O. Box
894, Brownsville, Texas, By: Hon. T. Gilbert Sharpe, of
counsel.

Be It Remembered that on the 27th day of March, A. D.
1961, et seq., the same being regular days of the January
Term of the 107th Judicial District Court of Cameron
County, Texas, there came on to be heard before the Hon-
orable Hawthorne Phillips, Judge of said Court, and a
jury, the above entitled and numbered cause;

Whereupon the following evidence, together with objec-
tions of counsel, replies, rulings, comments and exceptions
in connection therewith, was presented before said Court,
to-wit:

.

[fol. 2]

STIPULATION AS TO AND OFFERS IN EVIDENCE

Mr. White: It's stipulated that either party may offer into evidence papers from their files in each instance, including the bill of lading or copies of invoices, diversion orders, accounts of sale, inspection certificates at origin or destination, railroad running records, market reports, and— Anything else you can think of? —loading manifests.

Mr. Sharpe: Anything that relates to the actual handling of the shipment, from the standpoint of either the shipper or the railroad. The only thing I can think of, in some instances, our running or protective service records are in the form of telegraph. Now, Jack usually does this:—

Mr. White: Well, it's further stipulated that if the consignee were present in court that he would testify that the price received for the commodity was the market value [fol. 3] of the commodity in its condition and upon its arrival at destination.

Mr. Sharpe: Well, I think that gets it all right. Mr. White, of course, was not present last week; the only trouble we had on the stipulation there related to instruments which did not directly affect the shipment we had, such as comparison cars, letters, and I just wanted to get off on the right foot. We are not, on either side, agreeing to outside matters, but anything that does relate to these shipments, of course, will be admissible.

Mr. White: That is correct.

Mr. Sharpe: I think we have it straight, Your Honor.

The Court: The same stipulation that you had in effect last week?

Mr. Sharpe: Yes, sir; that we wound up with.

The Court: In other words, it would admit any statements of the agents or employees or representatives of either plaintiff or defendant, but not a third person?

Mr. Sharpe: That is correct.

[fol. 4] Mr. White: Your Honor, I'd like to call Mr. Fillpot on first. Before we begin the testimony, Your Honor, I'd like to put these documents into evidence under the stipulation.

The Court: All right.

Mr. White: On Count I, plaintiff offers the bill of lading; the diversion order; invoice showing the sale; the account of sales; the destination inspection certificate prepared by the United States Department of Agriculture; the Chicago Market Reports for the date of Monday, June 16, and Tuesday, June 17, 1958.

(Whereupon the instruments above referred to were marked for identification by the Court Reporter as follows: "Count I—Plaintiff's Exhibit Numbers 1 through 7.")

[fol. 6] Mr. Sharpe: There are a few pencil marks that need to be removed. Aside from that, we have no objection [fol. 7] to the papers on Count II. We have no objection, Your Honor, to any of these instruments. We do want the record to show that on Count IV we furnished the plaintiff the destination inspection.

Mr. White: Your Honor, I might suggest that it would shorten the record somewhat if we only entered the pertinent parts of these Government Market Reports that apply to this particular commodity.

Mr. Sharpe: Yes, I agree. There are so many items on there, and unless in that—I think in that instance, the pencil ought to be used—

The Court: I would suggest to counsel that they either circle the pertinent parts in pencil or in ink, the pertinent items on the Government Market Reports.

[fol. 8] JOHN FILLPOT, called as a witness by the plaintiff, being duly sworn, testified upon his oath as follows:

Direct examination.

By Mr. White:

Q. Would you state your name, please, sir?

A. John Fillpot.

Q. Mr. Fillpot, what business are you in?

A. I am in the gassing and precooling business on fresh fruits and vegetables.

Q. Now, you will have to speak up so all these people on the jury can hear you. What does that consist of? Just what do you do? Kind of explain it, generally.

A. Well, we have a—it's ethylene gas that we use for coloring and ripening process on honeydew melons after they are packed and loaded in the cars ready to be shipped.

Q. And will you explain generally how you go about it?

A. Well, my job, I have nothing to do with the shipping end of it or anything like that, but my job is to check the melons as they are being packed each day on the shed, and after they are loaded into the car, and see that the melons are loaded in good shape and they are good melons. [fol. 9] It's to my advantage, the same as anybody else's, because I am doing the gassing on the melons and we have to possibly do two or three different processes to the melons in the car. We let them sit for four or five hours and the car is opened up and if they need another shot of gas, why, we gas them again and that process is—when that is completed we know they are ready to ship. And we check the melons and I know they are okay when they leave there. If not, it's my business to tell the shipper or whoever is in charge of the melons.

Q. Now, Mr. Fillpot, what is the name of the business that you work in?

A. Modern Precooling. I work for Modern Precooling Company.

Q. How long have you been in this particular business?

A. '37; about twenty-three years.

Q. Is this treatment used only on honeydew melons?

A. No; it's used— That is all that I work on, is honeydew melons, but this same gas is used for citrus and it's being used over the Valley, I suppose, on citrus here, and bananas and tomatoes and different commodities.

Q. How long has this process been in use in the industry? [fol. 10] A. Well, as I say, I started in 1937 and I just could not tell you that. I don't know how long it's been.

Q. And is this the usual and customary procedure used in shipping honeydew melons?

A. All over the country. I work from here to California; it's all over.

Q. Now, this particular lawsuit involves three carloads of honeydew melons shipped out of Rio Grande City in June of 1958; were you working in Rio Grande City at that time?

A. Yes, I was.

Q. Did you handle these particular three cars?

A. All of the gassing of the honeydews held there is under my supervision, yes.

Q. You didn't do all of it personally?

A. No, no, I have a boy that has been in the business, worked for the company the same time I did that works for me, or works with me.

Q. But you were in Rio Grande City at the time, were you not?

A. I was in Rio Grande City, yes, sir.

Q. And were you familiar with the condition and the quality of the melons being shipped at that time?

A. I certainly was, yes, sir.

Q. Were you also working for other shippers in that [fol. 11] area at the time, other than Elmore & Stahl?

A. Yes, sir, I was.

Q. Do you recall the general quality and condition of the melons being shipped by Elmore & Stahl during this particular period of time?

Mr. Sharpe: If the Court please, unless the predicate is first laid showing his qualifications in connection with those matters, we object to it.

The Court: All right, I believe the objection would be good. You may develop it.

By Mr. White:

Q. I believe you stated a minute ago that you did observe these melons while they were being brought in from the fields and run through the grader and packer?

A. That is right. I am on the shed several times a day and check the melons. I know the melons go into the cars most of the time, yes.

Q. And you observed them for--well, what are you looking for at the time?

A. Well, I know that they were sound melons and good, shipable melons.

Mr. Sharpe: Well, we move to strike the last portion of the answer as being unresponsive, Your Honor.

[fol. 12] The Court: I am going to overrule the objection.

By Mr. White:

Q. I am asking, particularly, what characteristics are you looking for in the melon, itself, that has regard to your service that you perform?

A. Well, we just look for a good, sound melon.

Mr. Sharpe: May it please the Court, the objection was sustained that the predicate had not been laid until this man was shown to be qualified or competent to testify as to quality, and so far, he hasn't done it; yet he continues to give conclusions which depend upon that predicate.

The Court: Or knows how to judge melons?

Mr. Sharpe: Yes, sir, quality, condition.

By Mr. White:

Q. Have you worked with honeydews very long?

A. Well, I have been in them—I have worked with them for twenty-three years and I'm sure that most any shipper—

Q. Well, during that time have you developed the knowledge that you can tell a good quality and condition honey-
[fol. 13] dew melon?

A. I certainly have.

Mr. Sharpe: I'd like to have him on voir dire, Your Honor.

The Court: All right, you may take him.

Voir Dire examination.

By Mr. Sharpe:

Q. Now, Mr. Fillpot, just what business are you connected with?

A. I am connected with gassing honeydew melons and precooling on cantaloupes.

Q. Well, what company are you connected with?

A. Modern Precooling Company.

Q. Now, that is not Elmore & Stahl, the plaintiff in this case?

A. No, that is not.

Q. You are not in the packing-shed business, are you?

A. No, sir.

Q. And you are not a grower of melons?

A. No, sir.

Q. You are not a farmer?

A. No, sir.

Q. Are you familiar with United States Department of [fol. 14] Agriculture Standards that determine what quality a honeydew melon is or isn't?

A. Well, I don't know just exactly what you mean there.

Q. Well, what experience— Have you ever studied horticulture?

A. No, I haven't.

Q. Or plant pathology?

A. No, sir.

Q. Do you know how to test a melon to determine if it is diseased or has decay in it?

A. I certainly do. I handle from 500 to 1500 cars a year and—

Q. Where did you get your training to determine whether or not a melon has decay in it?

A. On the packing sheds, with the melons.

Q. You mean you just picked it up in the trade?

A. I did.

Q. Did you ever study any books in connection with the matter?

A. I've got books, but I've— I have still got the experience. It's a lot better than out of the books.

Q. What books have you ever studied that would enable you to determine the quality of a honeydew melon?

A. I've studied books at the company that Carbide [fol. 15] Company puts out.

Q. Would you name some of these for us?

A. Beg pardon?

Q. Would you name some of those books for us?

A. No, I couldn't name them.

Q. Have you ever studied the United States Department of Agriculture Standards? Do you know what I'm talking about?

A. Yes, I do, but I haven't, no.

Mr. Sharpe: All right, we submit he's not qualified, Your Honor.

The Court: Overrule the objection.

Direct examination (Continued).

By Mr. White:

Q. Mr. Fillpot, you stated you have worked with honeydew melons and you have observed what it takes to classify a melon as a good quality melon, have you not?

A. I have. I know it.

Q. I believe you stated a while ago that when the melons come in from the field you are concerned with their degree of ripeness, are you not?

A. That is right.

Q. And their quality, as far as color?

A. Yes, sir.

[fol. 16] Q. And what effect, actually, is this gassing supposed to have?

A. The gassing is for a ripening and coloring process.

Q. What color is the honeydew melon when it's brought in to the shed?

A. The honeydew melon is picked when they are just hard, firm, and white. And the gas is supposed to color them, for appearance of the melons.

Q. And it's supposed to color and ripen it?

A. That is right.

Q. To the point that the shipper and—together with your knowledge and advice to the shipper the fact that those melons are then ready to ship; is that correct?

A. That is right.

Q. And that is the service that you have been performing for some twenty-three years for the shippers?

A. That is right. And they don't ship them without it.

Q. Now, you don't recall the melons in each of these particular cars, or do you? Do you have any recollection to show what—any recollection of each car in this lawsuit?

A. No, I don't have the records here. No.

Q. But do you recall from your own personal knowledge or recollection that you were present at the time these [fol. 17] were shipped?

A. At the time they were being loaded, yes.

Q. In other words, you were there on the shed and you saw them as they came in from the field?

A. That is right.

Q. And noted their condition and quality?

A. That is right.

Q. What would you say generally was their quality and condition at the time?

A. Well, they were good melons, a perfect melon, as far as I know, when they were loaded in Rio Grande City.

Q. Now, if they had been discolored in any way, what would have taken place then?

A. The melons discolored, to my knowledge, are not even loaded. I mean, they just don't load those melons.

Q. Are there enough melons there of good color and quality to take up all of the loading here?

A. That is right.

Q. Could you tell us what happens to the melons that might possibly have off color or decay or some other defect?

A. Well, I just don't know just how to explain that. The only thing I know is that all of those melons that show any decay or discolor are culled out. They are culls. They [fol. 18] are just not loaded. And what happens to the melon from there on, I just couldn't tell you.

Mr. White: Pass the witness.

Cross examination.

By Mr. Sharpe:

Q. Mr. Fillpot, where do you live?

A. Laredo, Texas.

Q. How long have you lived there?

A. Since '56.

Q. Where did you live before that?

A. Phoenix, Arizona.

Q. You say you had been in this gassing business for over twenty years?

A. That is right.

Q. How long did you live in Phoenix?

A. About twelve years.

Q. And where did you live before that?

A. Well, Saint Helena, California.

Q. Saint Helena?

A. Saint Helena.

Q. About how long?

A. Three years.

Q. And before that?

[fol. 19] A. A fruit tramp don't have no home.

Q. I beg your pardon?

A. I was born in Missouri. I was raised in Missouri.

Q. Well, you said you had been in this business something over twenty years; I was just trying to find out where you had practiced your vocation during that period of time, and you tell us it was— Did you ever do any gassing in Missouri?

A. No, sir.

Q. Where did you start this gassing business?

A. Imperial Valley, Brawley, California.

Q. Was that when you lived in Saint Helena?

A. No, sir.

Q. Where did you live?

A. Well, it was Brawley at the time. I was living there. This is seasonal work. We just have a home where the work is.

Q. Well, if I get it straight, did you still live in Missouri while you were doing the work out there?

A. No.

Q. Where did you live when you first started doing the gassing work in California?

A. I lived at Brawley, California.

Q. Brawley?

A. Yes, sir.

[fol. 20] Q. All right, sir. Well, Brawley and then Saint Helena and Phoenix, Arizona, and then Laredo, Texas— does that cover it pretty well; that is, the places you have lived since you have been in this business?

A. Yes.

Q. Now, are you the owner of the company with which you are associated?

A. I am not, no.

Q. What is the name of it?

A. Modern. Modern Precooling Company.

Q. Where is its main office?

A. In El Centro, California.

Q. Who is the owner of that company?

A. G. W. Baker.

Q. Is he here today?

A. No, he isn't. He's in California.

Q. Well, then, do you know whether that is an individually owned business or a partnership or corporation?

A. I think it's individually owned.

Q. You think Mr. Baker owns all of it?

A. Yes, sir.

Q. And how many years have you been connected with that particular company?

A. About seventeen years.

[fol. 21] Q. Now, what equipment is used in connection with the gassing of honeydew melons, Mr. Fillpot?

A. There is nothing, only just this ethylene gas that comes in tanks the same size as acetylene welding and we have a regulator that fits on this tank and just a rubber hose that goes into the car and we adjust the gas through this regulator.

Q. Does your company furnish the tanks?

A. Yes.

Q. And the hose?

A. And the hose.

Q. And I suppose you have some trucks to haul the gas and the tanks in, don't you?

A. That is right, we do.

Q. Well, in this particular case; that is, where this service was performed for Elmore & Stahl back in 1958, did your company furnish all of that equipment, or did Elmore & Stahl furnish any of it?

A. My company furnished it.

Q. All right. And your company is paid on some sort of a contract or piece basis, I suppose?

A. On the car basis, yes, sir.

Q. And do you recall whether 1958 was the first year that you had done any work for Elmore & Stahl?

A. No, we did work for them in '57.

[fol. 22] Q. You personally worked on the Elmore shed?

A. In Rio Grande City, yes.

Q. You were living in Laredo, Texas, in 1958, in June, when you were doing this work for Elmore & Stahl?

A. I was, yes, sir.

Q. Did you travel back and forth from your home in Laredo to Rio Grande City, or did you stay in Rio Grande City?

A. No, I was in Rio Grande City.

Q. For what period of time?

A. Well, during the season, possibly four or five weeks. I don't know just when.

Q. In May and June?

A. In May and part of June.

Q. Of 1958?

A. Yes.

Q. Now, you said a while ago that you had some other employee; I think you referred to him as a boy who was with you. Were you two the only employees of the Modern Precooling Company working in Rio Grande City?

A. Working in Rio Grande City, yes.

Q. In 1958?

A. Yes, sir.

[fol. 23] Q. What was this other man's name?

A. Robert Higdon.

Q. Where is this boy today?

A. He's in Turlock, California.

Q. All right Mr. Fillpot, now, you didn't see any of the honeydew melons that are involved in these shipments in this case during the time they were in the field, did you, when they were growing?

A. Yes, yes, I do.

Q. You did see them?

A. I go to the field occasionally and see the melons before they are picked.

Q. Well, sir, I mean in this particular case, can you positively testify that you saw the particular melons that are involved in these three car shipments?

A. No, no, sir, I cannot.

Q. And were you there when they were harvested and put in the truck?

A. I was there when— No; I was there when they were brought into the shed and dumped out of the trucks, to be packed.

Q. And after these honeydews are brought into the packing shed, they go through a processing operation there, do they not?

A. They do. They go over a sorting belt and into the [fol. 24] bins before they are packed.

Q. Well, they go into a brushing machine, don't they?

A. Yes.

Q. And they go onto a conveyor belt?

A. That is right.

Q. And then they are graded out as to size, aren't they?

A. Yes, sir, as to size.

Q. And put into a crate?

A. That is right.

Q. And do you remember, can you tell us what size crates were involved in these shipments that we have in this suit here?

A. No, I cannot. There's times that they are mixed. They have different sizes in the same car.

Q. What size crates have you worked with for Elmore & Stahl as far as honeydew melons are concerned?

A. Well, we worked with cartons and crates, too. They run from eights, nines and twelves.

Q. You say eights, nines and twelves. Let's tell the jury what you mean by that; the number of cantaloupes?

A. The number of honeydews in a crate.

Q. When you refer to eight, you mean you've got eight in that particular package, don't you?

[fol. 25] A. That is right.

Q. And nine, you've got nine; and twelve, twelve in a package?

A. Yes, sir, that is right.

Q. All right. Now, at the packing shed when these honeydews are unloaded, they are unloaded by hand, aren't they?

A. Unloaded by hand?

Q. They come into the shed in the truck and then they are unloaded or pushed out by the conveyor belt?

A. They are dumped, yes.

Q. After the honeydews go through the brushing machine and onto the conveyor belt, they are dropped into bins for grading purposes, aren't they?

A. They are not dumped; the belt runs right even with the conveyor belt.

Q. Well, you have several layers of honeydews in a bin, don't you?

A. No.

Q. You don't have but one layer of honeydews in a bin where they are being graded?

A. They may be piled up, but they don't throw them from the conveyor over and pile them up; they have two or three helpers there at the bin. When the melons pile up, they lay them over.

[fol. 26] Q. Well, sir, let's see what your testimony is. Let's say we've got a lot of honeydews coming down the conveyor belt in the packing shed up at this very place that you're talking about—Elmore & Stahl's packing shed in Rio Grande City—and they get to the place to where they've got to go over into the bins before they are packed; is it your testimony that there is just one layer of honeydews in that bin at the time, or is there more than one?

A. No, I didn't say there was—I said they had help in the bins that would lay the melons over; after they rolled down and filled up so far, they would pile them up.

Q. By "help," you mean hands in the packing shed?

A. In the bin.

Q. Yes, that help get the honeydew melons off the conveyor belt over in the bins?

A. No, no. I didn't say to get them off of the conveyor belt. They roll off the conveyor belt into the bin and then they are piled up afterwards.

Q. Well, they are piled up three and four layers high on occasions, aren't they?

A. Well, there are occasions they might, if they need the room, yes.

Q. All right. By hand?

[fol. 27] A. Yes.

Q. And after they get them into those bins, the employee has to take them out by hand and put them over in a crate, does he not?

A. That is the usual procedure, yes, sir.

Q. Yes, sir, by hand. And then after the crate is filled up, there is a little question of getting the lid on it, isn't there?

A. Well, it has to be lidded, yes.

Q. Yes. Well, have you observed them up at the Elmore & Stahl packing shed at Rio Grande City putting the lids on these crates of honeydews?

A. Yes, I have.

Q. How is it done—by hand or by machine?

A. It is done by machine, mostly.

Q. That is, the lid is pressed on by a machine?

A. Yes.

Q. And after the lid is put on the crate or carton of honeydews, why, then, it has to be carried out to the railroad car and put in a railroad car; is that correct?

A. That is right.

Q. And are you familiar with the way cantaloupes or honeydews are packed in a railroad car?

A. I have a good idea, after being around them twenty-
[fol. 28] three years.

Q. Yes, sir. Well, will you outline that now, starting at the place where the cartons or crates of honeydews are at the railroad car and tell us how they are placed inside of it and what is done to them prior to the time you do any of your gassing work?

A. Well, the melons go down the conveyor through the press; after the lid is on them, they are set off one by one.

Q. By hand?

A. By hand, on the floor, possibly six or seven high, and then they have hand trucks there that they truck them into the car, right back to the loader end. That is when it's loaded on out.

Q. Just go ahead; tell us, after the honeydews and the cartons or crates are put in there, what is done?

A. There isn't anything to tell. After they get the car loaded, they are loaded and braced out, and after they get through with them, that is when I take over.

Q. You say they are loaded and braced out; what do you mean by that?

A. There is a brace on all wood crates. They are loaded up to a certain point on each side and then they put eight [fol. 29] in there and spreaders.

Q. Now, Mr. Fillpot, you have told us you have been watching this for twenty-three years, haven't you?

A. Most of the time.

Q. Isn't that what you said?

A. Yes.

Q. Now, will you please tell us how these crates are put into the car and tell us how they are arranged, how many layers you have, how many braces are put on them; how are they put into that car to where it is filled up?

A. I'm not so sure whether that goes into my part of this deal or not. After all, as I told you when I started, I'm only working—I just have the gassing end of it and I have nothing to do with the loading, nothing to do with the bracing—nothing; just the gassing. That is my end of it. So that is more or less up to the shed foreman.

Q. You are waiting around to gas these melons after they are loaded?

A. I'm not waiting around. I have other jobs to do. I don't work for just Elmore & Stahl there; I do gassing for other people.

Q. The truth of the matter, Mr. Fillpot, is you are not concerned with these honeydew melons until they are put [fol. 30] in the car and loaded and ready for shipment; now, isn't that correct?

A. I didn't say I wasn't concerned with them. I had nothing to do with them until that time.

Q. Well, that is right. But you are willing to say they were in good, sound condition when you saw them inside the crates in a railroad car; that is your testimony, isn't it?

A. The melons that I work on, yes, sir, I am willing to say that.

Q. And as far as you can testify under oath to this jury, the first time you saw those melons is when they were loaded in the car right before you got ready to gas them; isn't that right?

A. No, that isn't right.

Q. All right, let's start right here at the beginning. Here's Count I of this case, Car ART 35042; do you have any recollection or any record telling us, first of all, how many crates or cartons of honeydews were in that car?

A. No, I don't. I told you, I have no records on the cars.

Q. All right. Now, tell us when you first saw those cartons of honeydews?

A. Which cartons are you talking about?

[fol. 31] Q. The ones that— This is a lawsuit, Mr. Fillpot, in which the plaintiff has described a shipment of honeydews in Car ART 35042, and what I'm asking you is this: When did you first see the cantaloupes or honeydews in that car? Can you tell us or not?

A. No, I can't. I have no record, I told you, whether—

Q. Well, I am asking you about your recollection, now. Do you remember seeing those cantaloupes in the car waiting for you to gas them?

A. On these particular cars?

Q. Yes, sir.

A. Well, I was in town. When I see the melons on the shed, I can't tell you just what car they are going into.

Mr. White: Your Honor, counsel is arguing with the witness. I think we brought that out in the beginning that Mr. Fillpot does not recall the cantaloupes in each particular shipment. My questioning of him was of a general nature, whether he was familiar generally, but he stated in the beginning that he has no knowledge of the particular cantaloupes in each particular car in this shipment.

Mr. Sharpe: In the light of counsel's statement, Your [fol. 32] Honor, we move to strike all of this witness' testimony in which he has referred to these melons as being in good and sound condition.

The Court: I believe it would go to the weight of the testimony, rather than the admissibility. I will overrule the objection.

By Mr. Sharpe:

Q. Now, Mr. Fillpot, you can't tell this jury under oath today that you ever saw a single one of these honeydews that you can identify, not guess about it or what somebody

told you; you can't tell this jury that you ever saw a single one of these honeydews until they were inside the railroad car and inside of a carton, can you?

A. I couldn't tell you for sure whether I saw any of those melons in any of those three cars or not.

Q. All right. Now, sir, you say that you are not in the packing-shed business, you are not concerned with selling honeydew melons, are you?

A. No, sir.

Q. What you are there to do or what you were there to do was to perform this gassing service and that was all?

A. That is right.

Q. Now, under whose supervision did you do that? Who [fol. 33] told you when to start and when to stop?

A. I am the representative in this district down here for the Modern Precooling; nobody tells me.

Q. You are the one that has the final say as to how much gas you will put in the cars?

A. That is right.

Q. And how long you will leave it on there?

A. That is right.

Q. And the temperatures in the car at the time that you put the gas in; is that right?

A. That is right.

Q. All right. Now, then, I'll ask you if it isn't true that you cannot put this gas into the car unless it's dry? You've got to put it into a car that has no ice in it; is that correct?

A. That is correct.

Q. So what you have is honeydews which have been brought in from the field, packed in the packing shed under the general process that we have outlined here, put in a railroad car and "braced," as you put it,—we'll develop a little later how it's done—and kept there without having been cooled at all for some period of time that you don't know about that's elapsed since they have been picked off the vine or cut off the vine and into the car. That is what [fol. 34] you have, melons during all that period of time which have not been under any kind of refrigeration; is that correct, sir?

A. That is correct.

Q. And when you put our gas into this car, you close all the doors and all the vents, don't you?

A. That is right.

Q. And what you are trying to do is to mature that honeydew, isn't it?

A. These honeydews have to be hot before the gas takes effect on them. If you don't have at least eighty to eighty-four pulp temperature, you are not getting the job done.

Q. And the reason for getting the gas there is to mature them and to change the color; is that right?

A. That is right.

Q. When those melons come into the packing shed, they are not at full maturity and they don't have a color that is attractive in appearance; isn't that correct?

A. That is correct, to a certain point. But you can't pick honey—if you picked honeydews on the vines till they were ready to ship, you couldn't ship them, I mean until they were ripe. They have to be picked when they are hard and firm.

[fol. 35] Q. So you have to pick them when they are green, don't you?

A. They don't pick them when they are green, hard and firm.

Q. But instead of leaving them on the vine to get mature and ripe; the gassing process does that very same thing; that is, makes them more mature after they are packed in the railroad car; isn't that correct?

A. You couldn't ship honeydew melons if you picked them on the vines when they were ripe.

Q. What I have said is correct; then, isn't it? The purpose of gassing them is to make the honeydew melons mature?

A. That is right.

Q. And in the process of this gassing, where this railroad car is closed up and where the temperature is whatever it is on a hot day in Rio Grande City, how long did you usually leave the gas in there?

A. From four to five hours.

Q. And during that period of time does it get pretty warm inside that car?

A. It does. That is the way we want it.

Q. Could you give us a statement of how hot it gets in there?

[fol. 36] A. No, I couldn't. I don't take no temperatures.

Q. Well, it could easily go to a hundred degrees or more, couldn't it?

A. It could.

Q. And after how many hours of gassing do you look at the melons?

A. We usually leave them closed up for about four hours and then we open the doors up, the vents, and air the melons out and give them a chance to see if they are coming around, are colored. If not, why, we close them up and give them another shot.

Q. All right, sir. You have just said you open the car after several hours to see if the melons were coming around to their color; is that what you said?

A. That is right.

Q. Now, what color are honeydew melons? What are they, ordinarily? You say you don't remember these, when they are put into the railroad car and what color do you expect them to be when you finish your gassing?

A. They are white. Just a white melon when they go into the cars and when we get through with them, we hope that they are all yellow. They are supposed to be yellow.

Q. They are white to start with and yellow when you [fol. 37] finish up with them?

A. Yes, sir.

Q. Well, now, Mr. Fillpot, think about that a little bit. Isn't the very object of putting gas in a car to take the green and the chlorophyll out of these honeydew melons?

A. We don't pack green melons.

Q. Green-colored melons?

A. Maybe the white melons, but not the green.

Q. Well, aren't they a greenish-white?

A. Well, it's possible you could find some of them, yes.

Q. Is it your testimony that these melons at Rio Grande City do not have any tint or degree of green in them when they are brought into the packing shed?

A. There are some of them that do, yes.

Q. Well, suppose you tell us, then, what is the object of this gassing process, in terms of changing the color? What color do you want to change them from to?

A. From white to a ripe color.

Q. To light color?

A. From white to a ripe color.

Q. To a ripe?

Mr. White: Ripe? R-i-p-e?

[fol. 38] The Witness: Yes.

By Mr. Sharpe:

Q. Is that what you mean by "ripe," is a yellow color?

A. That is right.

Q. Mr. Fillpot, I am going to have to ask you to go into a little bit more detail on these colors, now. Do you say that a honeydew melon in a railroad car, under the conditions that you have described up at Rio Grande City at the time they are to be shipped, should be yellow?

A. At the time they are to leave there, you mean?

Q. Yes.

A. Well; a cream color, yes.

Q. Well, now, do you make a distinction between a cream color and a yellow color?

A. Well, they are about the same, I guess.

Q. Well, now, are you the man that determines when the car of honeydews gets ready to leave up there what color these melons should be?

A. I am.

Q. Are you the man that determines that?

A. I am the man, yes, sir.

Q. All right, sir. What color do you want them to be when they are ready to be shipped out?

A. A ripe color. There is a difference between a green [fol. 39] melon and a ripe melon.

Q. All right. A ripe melon is what, now?

A. It's a cream color.

Q. A what?

A. A cream color.

Q. It's not yellow?

A. Well, either one you want to take; it doesn't make any difference.

Q. Cream or yellow? You can't be more specific about that?

A. (No answer.)

Q. Do you have any idea what the seller of those melons wants them to look like when they get up to—wherever this one went to—Chicago, what color he wants them to be?

A. I know a lot of those brokers up there.

Q. What do they want?

A. They want a ripe color.

Q. Would that be cream or yellow?

A. It would be a cream. I don't know what you call it.

Q. Is there any other desirable color when they get up to Chicago and want to sell them?

A. Not that I know of.

Q. Now, if, after you first close up the railroad car and gas these melons for several hours and you open up the [fol. 40] doors and look at them, the melons haven't changed their color sufficiently, you give them some more gas, don't you?

A. We can't tell when we first open the door. It doesn't make any difference how much gas you give them; if you don't open the doors and air them out, you won't get any color. We determine that after we open the doors and let them air out.

Q. Can you tell us something that would throw some light on these cars in Count I—

A. I have no record on these cars. I send the records all in to the company and I don't keep them, myself. I have no way—I can get all of them, yes, but I have no records now or with me.

Q. You couldn't tell us on Count I whether that car was gassed four hours or eight hours or twenty-four hours, could you?

A. Well, no, not till I saw the records, that is right.

Mr. Sharpe: Didn't you have a record on one of them?

Mr. White: No, we don't have any gas records.

(Informal discussion off the record.)

By Mr. Sharpe:

Q. Well, now, Mr. Fillpot, did it happen to you back in June of 1958 when you were at Rio Grande City doing this [fol. 41] contract work for Elmore & Stahl on occasions that you would open up a car after you had gassed the

honeydews for several hours, let it air out, look at the melons and you decide to put more gas to them?

A. On these cars here, you mean?

Q. Yes, sir.

A. I told you, I have no records; I can't tell you about those cars. We do on lots of cars, but I can't tell you about those.

Q. And the purpose of doing what you did to these cars to gas them was to change the color and to mature the melons in a short period of time; is that correct?

A. To help mature them, yes.

The Court: Let's take about a ten-minute recess. We are at recess; the jury may go outside or you may stay in here.

(Whereupon at 3:45 p.m. a recess was taken, after which, at 3:53 p.m., the trial was resumed in the presence of the jury and the following proceedings were had:)

The Court: All right, you may proceed.

By Mr. Sharpe:

Q. Mr. Fillpot, a few minutes ago, you told us that after you had applied gas to a railroad car which contains [fol. 42] these honeydews that you, after a while, would open up the car, let it air out, and then look at the honeydews; is that correct?

A. That is right.

Q. How many honeydews do you usually look at?

A. Well, how many is in a car? We can't see all of them, but we can see everything that is in the squeeze, or close to the doors.

Q. Yes, sir. Well, that is what I asked you; how many do you look at?

A. I can't tell you the amount, but then, we look at everything that is in range of the doors that we can see.

Q. Everything that is within the range of the doors?

A. That we can see from the doors, yes.

Q. Yes, sir. Well, how many cartons or packages are within range of the doors when you open it to where you've got a full load there?

A. Possibly a half of the load.

Q. Half of the load?

A. Yes.

Q. When you gas a railroad car, is there usually a center brace in it or not?

A. It depends on whether you are loading cartons or [fol. 43] wood. On the wood crates there is a center brace in, yes.

Q. And on what other kind of cartons did you say?

A. On cartons, pasteboard cartons.

Q. Pasteboard cartons?

A. Cardboard.

Q. Is that a solid load instead of a center brace?

A. Solid load, yes.

Q. Usually how many layers of cartons are loaded in a shipment of honeydews in a railroad car?

A. I don't recall just how many layers.

Q. How many layers high?

A. Possibly six high.

Q. Six high. And about what is the height of the cartons?

A. I don't see that that comes within my part of the deal on gassing. I have nothing to do with the loading or that part of it at all.

Q. Well, are you really telling us, then, that you don't look at those honeydews after you finish gassing them? Is that what you are telling us?

A. I tell you I do look at them, yes.

Q. Well, then, I asked you how many do you look at?

A. I look at the melons next to the door.

Q. Well, take them one at a time, cartons first, pasteboard [fol. 44] board cartons. How many of the pasteboard cartons do you look at after you finish your gassing next to the door?

A. Just the ones that I can see right in the doorway.

Q. Well, how many will that be?

A. Well, it could possibly be ten or twenty. I don't—

Q. Ten or twenty?

A. Yes, sir.

Q. How long is an average railroad car, Mr. Fillpot?

A. How long?

Q. Yes, sir. What's the length of it?

A. About forty feet.

Q. I see. And if you are standing at the center of it, you, of course, would have to look approximately twenty feet in either direction, wouldn't you?

A. I would, to see the bag, yes.

Q. Yes. And let's take a shipment, now, of honeydews in cartons. Those are pasteboard cartons, are they?

A. Cardboard, yes.

Q. Cardboard. Are the melons completely covered, or do you have some openings in that type of container?

A. There's openings in the top.

Q. In the top?

A. In the top crate, yes.

Q. All right. Now, what do you do after you have [fol. 45] finished your gassing job by way of examining the honeydew melons?

A. Well, I just told you. I look at the ones in the doorway. I have no way of going back in the cars and see what the melons are.

Q. Well, do you look at the holes in the cartons, or what?

A. We take out a few cartons, maybe four or five, and look at the cartons.

Q. You say you might look at how many?

A. However, this hasn't anything to do with the melons here. I don't think carton loads—

Q. Well, sir, the number of samples that you look at has something to do with it, doesn't it, as far as you are concerned? Don't you want to determine whether you do your job right or not?

A. I do determine. If I didn't do it right, I wouldn't be there.

Q. Yes, sir. And you look at how many honeydew melons, now, after you have finished your gassing?

A. There isn't any certain amount.

Q. Well, what's the average?

A. We look at the melons in the doorway and if they are all right, we judge by that that the rest of the car is okay. That is the only thing we can do.

[fol. 46] Q. How many, on the average, do you look at?

A. I just got through telling you.

Q. From four to five?

A. Yes.

Q. Is that melons?

A. Cartons.

Q. How many melons will that be?

A. It depends on how many are in the crates.

Q. If they are eights, that would be five times eight is forty; is that right?

A. That is right.

Q. Well, where you've got a carload, as you do have in this case, of 640 cartons, you would look at at least one per cent, wouldn't you?

Mr. White: Let's keep the record straight here. There are 640 crates.

Mr. Sharpe: Crates, yes.

By Mr. Sharpe:

Q. Six hundred forty crates. You might look at one per cent of them; is that right?

A. Possibly.

Q. And what you do is, you look at these melons right in the center of the car and if they are all right, you just assume that the rest of the load is just like it; is that right?

A. That is right. We see the melons when they go in [fol. 47] there. We know they are out of the same field. We know they are the same kind of melons. So, naturally, they should be.

Q. Do you or not, Mr. Fillpot? We went through this just a few minutes ago, and I asked you about the melons coming into the shed and being packed and brushed and so forth and you started telling me you weren't concerned with them until they got in the railroad car. Now, which is right?

A. No, I don't remember making that statement. I am concerned with them. I check the melons as they come into the shed, while they are packing the melons, to see that they are—what kind of shape the melons are in.

Q. Do you have anything to say as to whether a melon shall go into a particular crate or carton?

A. No, I have nothing to say about that.

Q. That is determined by the people at Elmore & Stahl, isn't it?

A. That is right.

Q. All right. Now, then, in a full railroad shipment of cartons or crates, either one, you couldn't see more than just a few of them at the center of the car unless you crawled up in the top of the car in a narrow space and went down the car and took out individual samples; is that [fol. 48] right?

A. You couldn't take them out.

Q. That is right, you couldn't take them out for the simple reason that the crates are stripped and nailed clear across the car, aren't they?

A. I wouldn't say that they are.

Q. You don't know that?

A. No.

Q. Did you ever see a shipment of Juanbo? Did you ever see a shipment— Well, how many cartons or crates are usually in a railroad car?

A. How many cartons?

Q. Yes, sir.

A. Well, they will run as high—from eight forty, probably, in cartons and five seventy-five to six fifty in crates.

Q. I see. All right. And they are fastened in, aren't they?

A. I don't know. Yes, they are fastened in, but I don't know what you mean by "strips."

Q. You don't?

A. No.

Q. What happens, Mr. Fillpot, if you put too much gas on these melons in the car and they are made too ripe? What do you do then when you look at your samples?

[fol. 49] A. That is what I learn by working with these melons, with my hands, instead of getting it out of a book.

I know what to put on there and what not to.

Q. What I asked you is, what do you do?

A. I don't know. I don't put too much gas on them.

Q. You don't?

A. I haven't yet.

Q. Never have made a mistake in twenty-three years of putting gas on melons?

A. If I have, I never have been called on it.

Mr. Sharpe: We pass the witness.

Redirect examination.

By Mr. White:

Q. Mr. Fillpot, you did state you observed these melons as they come in and go through the grading process?

Mr. Sharpe: Now, Your Honor, I think we ought to get it straight. He did or he didn't. One time he says he does and the next time he says he doesn't. He is giving an opinion on condition one time on the basis that he did and then he didn't and I think counsel ought to ascertain it and the Court ought to rule on our objection, in the light of whether [fol. 50] he does or doesn't know about these melons.

Mr. White: Let me change that.

The Court: All right.

By Mr. White:

Q. The melons, generally, during this time, during June of 1958, for Elmore & Stahl?

Mr. Sharpe: We object to that, because of its generality and its lack of relationship to these shipments, Your Honor.

The Court: Overruled.

By Mr. White:

Q. And you state that you did, during that time, observe the melons as they were being unloaded and run through the grading process?

A. I am on the shed off and on all day long.

Q. And you state that you are not concerned with the way they are crated and packed into the car? When I say "concerned" with it, you don't have anything to do with how they are crated and packed?

A. No, sir, I do not.

Q. But you do keep abreast of the conditions and color of those melons during all of that time?

A. I do. That is part of my work.

Q. And the manner in which you go about your business, would you state whether or not it is the generally accepted practice throughout the industry in the United States?
[fol. 51] A. That is right, sir.

Q. And it's the manner of doing business that has been devolved in some twenty-three years' experience, as far as you know?

A. That is right.

Mr. White: Pass the witness.

Recross examination.

By Mr. Sharpe:

Q. Mr. Fillpot, can you tell this jury that you saw—on your oath—a single one of the honeydew melons involved in this case?

A. I cannot.

Mr. Sharpe: All right, sir. We pass the witness.

Mr. White: We are through with Mr. Fillpot. Can he be excused, Your Honor?

The Court: You want this witness any more, Mr. Sharpe?

Mr. Sharpe: Does he want to go back?

Mr. White: He wants to go back to Laredo. He's got two cars to gas tonight.

Mr. Sharpe: All right, we'll excuse him.

The Court: All right.

Mr. White: Thank you.

[fol. 52] (Witness excused.)

Mr. White: We'd like to call Mr. Ed Baker to the stand now.

EDWARD BAKER, called as a witness by the plaintiff, being duly sworn, testified upon his oath as follows:

Direct examination.

By Mr. White:

Q. State your name and place of residence, Mr. Baker.

A. My name is Edward Baker. I work for Elmore & Stahl, Pharr, Texas.

Q. Where do you live, Mr. Baker?

A. I live in Pharr.

Q. And how long have you lived in Pharr?

A. Since 1937.

Q. How long have you worked for Elmore & Stahl?

A. Since 1952.

Q. And what is your general type of work that you do for Elmore & Stahl?

A. I am Office Manager for Elmore & Stahl.

Q. In that regard, are you familiar with the sales daily?

A. Yes, I am. I process the—all the car folders that [fol. 53] are handled during the day, all the cars that are sold.

Q. And you keep abreast of the market values of these commodities daily?

A. Yes, sir.

Q. In that connection, would you explain to the jury just how you do keep familiar with the market values and prices that these commodities are receiving or selling for on the various markets?

A. We have produce reporter machine that is called a Translux Crispo Reporter Market Service, comes out of New York, and it starts about six o'clock in the morning and it reports the current prices, New York and all the other major markets of the United States, the current price that items sold for that day, and that comes all through the morning.

Q. Now, in addition to that, do you keep in telephone communication with the various consignees or agents who sell these commodities for you in various markets?

A. Yes. Our salesmen are talking to the markets constantly and they are keeping abreast of the markets and the sale prices. The people that receive our merchandise wires us. If we don't talk to them on the phone, they wire us daily what our produce is selling for.

[fol. 54] Q. And what different manners of sale do you make? Would you explain to the jury briefly what an F.O.B. sale is, for instance, as distinguished from a sale on consignment?

A. There are a number of different ways that produce is sold. Produce is sold what we call "FOB," or F.O.B., which means the purchaser buys produce at the packing shed loaded in the car and at the time the car leaves the shed it's their produce. There's no recourse on it, as long as it makes the grade. Then we have a consignment sale, which means that we ship it to a merchant in some market and he handles that on a consignment basis and he charges us a percentage of the sales price for his services. Then we have a joint deal, what we call a "joint sale," which we agree with the purchaser the cost of the produce at the packing point. And if the produce brings a profit, over and above the joint cost or joint expense,—by the time you add on the freight and the cartage, inspection fees, demurrage, icing and all those charges, if the produce brings money in excess of all those charges, then, the profit is split equally. That is a normal joint deal.

[fol. 55] Q. Now, you mentioned that many of your sales are made on consignment; that is, where the selling agent, say, in New York, for instance, or Boston, as we have in this case, sells the car on consignment, he charges you a commission for selling that car?

A. That is right.

Q. And the more he sells the car for, the higher commission he gets?

A. That's true.

Q. The more money he makes?

A. That is right.

Q. The same for your joint sales; the more that they are able to sell the car for, the more profit for both of them?

A. That is

Q. Now, your F. O. B. sale, you say that the car is sold to the buyer for a certain price to you net in—at the point of origin, provided, now, that it arrives there in good condition; is that correctly stated?

A. Yes, that is true. F.O.B. sales are always sold on a condition basis. Otherwise, well, the receiver wouldn't accept the car if it wasn't in good shape when it arrived at destination. So there has to be a trust in both parties before you can make an F.O.B. deal.

[fol. 56] Q. Now, how about a car sold delivered? What does that mean?

A. Delivered? Some markets or some buyers want cars sold on a delivered basis, so that they will know exactly what the car is costing them at their receiving point. Also, it doesn't necessarily give them an out in case they don't want to accept the car, because if the agreement is made; whether it's delivered or sold F.O.B., there is always the possibility of the receiver wanting to refuse the car for some reason or other. However, if there are inspections made, the receiver has to have a real good reason before he can refuse acceptance on a shipment.

Q. In other words, if he buys a car that is represented to be a U.S. No. 1 car and it gets up there and is out of grade because of condition, why, then, he has a just cause in rejecting that car?

A. That's true, yes, sir.

Q. And in that event, what do you do?

A. Well, in that event, we try to get someone to handle it for us. If we can't sell it to someone else, we have to have one of our consignment merchants to take it off our hands [fol. 57] or take it and sell it for what he can get for it.

Q. Now, in Count I here is a car of honeydew melons which, according to the bill of lading which has been offered into evidence as "Plaintiff's Exhibit 1," is 640 crates of honeydew melons shipped out of Rio Grande City on June 12, 1958, and originally consigned to Elmore & Stahl at St. Louis; would you explain to the jury why it was originally consigned to Elmore & Stahl?

A. All of our honeydew cars are shipped out of Rio Grande City and we roll those cars or ship them daily and we don't put them in any particular place until they are

up the line. It's very occasional we do sell one sold F.O.B. Rio Grande City, but generally, no.

Q. In other words, this car was originally consigned by Elmore & Stahl to—

A. Let me mention one more thing. Rio Grande City is thirty-five miles or thereabouts from Pharr and those cars are usually billed out late in the afternoon or at night and the people up there, it's easier for us to just have them shipped to one destination. We get away from mistakes of shipping cars to points—that they might ship the wrong car to a certain place, so we just have them all shipped to El-[fol. 58] more & Stahl, and then we make the diversion to suit ourselves.

Q. And this particular car was billed out on June 12th, then diverted by Elmore & Stahl or reconsigned to Chicago, Illinois, on the 13th; would you check your records on that and then state what action was taken on that car on June 13?

A. I didn't quite get the question.

Q. Well, what action did you take on that car on June 13?

A. You mean what the car was sold for?

Q. Yes, and what diversion order was made with the Missouri Pacific Railroad Company?

A. This car here was diverted to a company, LaMantia Bros. Arrigo Company, at Chicago on June 13; it was shipped from Rio Grande City on the 12th. The invoice here from LaMantia Bros. Arrigo Company to National Tea Company, Chicago, was billed at three dollars a crate delivered Chicago \$1920.

Q. Now, on what date was that sale made?

A. Well, that sale was made on June the 13th.

Mr. Sharpe: If the Court please, we object to this evidence on the basis of an F.O.B. sale, because there is no showing, no contention, no pleadings, whatsoever, that the [fol. 59] railroad had any notice of that. Now, if you are going to limit it to market value, that is one thing, but we object to any testimony as to the price or the sale there between LaMantia Bros. and National Tea Company.

Mr. White: Your Honor, I am sure counsel has full records of this transaction. If counsel wishes to keep this evi-

dence out, of course, we'll contend for the top market on the day in which it was—the car arrived, which was much higher than the F.O.B. sale. I'm afraid we're limited in our damages by the F.O.B. sale.

Mr. Sharpe: Well, I want to get it straight as to what he's relying on. Now, if he's relying on an F.O.B. sale, I'll look at it in that light, but the pleadings do not so allege.

The Court: All right.

Mr. White: Did I understand Your Honor to—

The Court: I understood Mr. Sharpe was withdrawing it.

Mr. Sharpe: I am withdrawing it temporarily until we see what you are relying on.

[fol. 60] By Mr. White:

Q. You said that car was sold delivered for three dollars a crate?

A. Yes, sir.

Q. In other words, delivered—what do you mean by that?

A. That means delivered Chicago. We pay the freight and all the charges to Chicago. When it gets to Chicago, it's their merchandise for three dollars a crate.

Q. In other words, you get three dollars a crate or a total of \$1920, I believe it would be, and out of the \$1920 you have to pay the freight?

A. Yes.

Q. You have any other cost of sale, such as brokerage to the La Mantia Brothers?

A. On this particular car there was a brokerage charge of fifty dollars to La Mantia Brothers. We pay them the brokerage out of our profit.

Q. Now, what happened to that car when it got to the destination, Chicago?

A. Well, this particular car was refused by National Tea Company and La Mantia Brothers took it back and sold it on a consignment basis and handled the car for our account.

Q. And the account of sales, then, what does it show the gross sales received?

[fol. 61] A. Gross sales were \$1423.75.

Q. Now, what was the net that you realized out of that?

A. \$562.71.

Q. How much was the freight on that car?

A. The freight? \$605.92.

Q. Six Hundred five ninety-two?

A. Yes, sir, six-o-five ninety-two.

Q. And that you would have had to have borne even if the delivered sale had gone through?

A. Yes, sir.

Q. And you would also have had to pay La Mantia Brothers fifty dollars brokerage?

A. Yes, sir.

Q. In other words, you would have netted \$1275.18, had the car arrived in good condition and had been accepted by National Tea?

A. That sounds about right.

Mr. Sharpe: What is that amount?

Mr. White: Twelve seventy-five eighteen.

By Mr. White:

Q. But instead, you realized how much?

A. \$562.71.

Q. That would be a difference of \$712.47 less than you would have realized had the consignee accepted the car and had it arrived in good condition?

A. Yes, I suppose, if that figure is right.

[fol. 62] Q. You have also what has been offered into evidence a destination inspection certificate prepared by the United States Department of Agriculture, which shows this car to have arrived showing some decay and discoloration, and shows that it now fails to grade U. S. No. 1 only because of those condition factors; is that not correct?

A. That is right, yes, sir.

Q. And was that the reason the car was rejected by National Tea?

Mr. Sharpe: We object to that, Your Honor, unless he knows it of his own knowledge or unless it's supported in some place by the record. If it is, I will withdraw it. Is it?

Mr. White: Well, let me ask the question:

By Mr. White:

Q. Do you know?

A. No, I do not know why they rejected the car.

Q. Your records don't reveal the reason why they rejected the car?

A. No, other than this inspection certificate here. Usually, anyone that rejects a car has to have a good reason or else we wouldn't let them reject it. We wouldn't sit around and let them reject a car if they wouldn't give us a good reason for kicking one over. The first thing [fol. 63] we do is get us an inspection. If it comes up to what it should, we say "Okay, it's yours." If they want to argue about it, we call the P. A. C. A., which is the Perishable Foods in Washington, and they run over there real quick and get things straightened out.

Q. In other words, these matters are governed by government regulations?

A. Yes, sir.

Q. Are they not?

A. Yes, sir.

Q. And the consignee or receiver in that instance cannot just arbitrarily refuse to go through with the sale?

Mr. Sharpe: If the Court please, we move the question and answer be stricken for the reason that there is a completely different procedure set up for handling these P. A. C. A. cases, which has nothing to do with this case, and if Elmore & Stahl wanted relief under the P. A. C. A., they certainly could have gotten it.

The Court: If that is not involved in this case, it will be sustained on the grounds that it's immaterial.

[fol. 64]

By Mr. White:

Q. But examining that government inspection, would you state that that shows adequate cause for National Tea to reject the car?

Mr. Sharpe: We object to that as a conclusion based upon no evidence, and at best, hearsay.

The Court: Sustained.

By Mr. White:

Q. What is ordinarily valid cause for rejecting a car?

A. When it doesn't meet specifications or when it isn't good produce on arrival.

Q. Well, according to that inspection, was this car in good condition upon arrival at destination?

A. Well, according to this, it wasn't.

Q. Now, had it arrived in good condition, Mr. Baker, the sale would have gone through, but just in the absence of that, do you have market reports there and were you familiar with the market on the Monday morning in which that car was first available for sale?

A. Well, this market report here on June 16, which I guess that car should have gotten there about then.

Q. That would have been a Monday?

A. About five or six days later, after it shipped from Rio Grande City, honeydews in Chicago, Texas flats, 8s, [fol. 65] mostly \$4.00. Few four and a quarter. Standard 9s, which we are talking about, I guess; it's underlined here, \$4.00 to four and a quarter a crate.

Q. In other words, they would have brought and would have been worth how much, had they arrived in good condition?

A. Well, they would have been worth a dollar a crate more to the buyer. We sold them for \$3.00 and the market was \$4.00 then.

Q. How much would these melons have brought on the Chicago market had they arrived in good condition, disregarding the F.O.B. sale or the delivered sale, rather?

A. It says four to four and a quarter.

Mr. Sharpe: If the Court please, we move to strike the question and the answer, on the ground that the plaintiff has not related this particular shipment, as to quality and condition, to anything which might be covered by the United States Department of Agriculture market dates on the date in question, and we are not objecting to the report, itself.

The Court: Under the question asked, the objection is good. I will sustain the objection.

[fol. 66]

By Mr. White:

Q. Now, Mr. Baker, are you familiar with the quality and condition of these particular melons had they arrived in good condition?

A. Am I familiar with the quality or the demand?

Q. What these particular melons in this car—would you be able to tell the jury approximately what quality they were?

A. I don't know what they were.

Q. Well, can you determine that from that government inspection?

A. Well, I can look at this government inspection here and it says that, "Now fails to grade U. S. No. 1 only account of discoloration and decay." I might add this, it says, "Quality: Mature, clean and well formed. Grade defects average six per cent, mostly scars." Then, "Now fails to grade U. S. No. 1 only account discoloration and decay."

Q. In the absence of that condition factor that is now in the car, they would have been U. S. No. 1, would they not?

A. I suppose so. I don't know. I am not an inspector. I don't know what the grades are. When they say, "U. S. No. 1," I don't know.

Q. You knew, though, that— Didn't you state that you [fol. 67] were familiar with the price that U. S. No. 1 or top quality merchandise honeydew melons were bringing on the New York Market?

A. Well, on the Chicago Market.

Q. Chicago Market, I mean.

A. They are talking about the best quality, good quality melons, four and four and a quarter.

Q. That's good quality?

A. That's good quality. There is a range there of four and four and a quarter. These melons sell on appearance, just altogether. If you have a melon that is beautiful and smooth and has the right texture and right color to it and right feel, that melon is going to sell better than one that has sunken spots and is discolored. They sell on appearance.

Q. What quality is higher than U. S. No. 1?

A. That is as high as they go, in vegetables and fruits. I don't know about citrus; they used to have different grades, but I don't know. I'm not an inspector.

Q. U. S. No. 1 is the top quality?

A. Yes, it's supposed to be, U. S. 1.

Q. And would be expected to bring the top price on the market?

A. Yes, I suppose so.

Q. Now, then, you are familiar with the operation of [fol. 68] Elmore & Stahl, are you not?

A. Yes, I am.

Q. They wouldn't ship honeydew melons, with decay and discoloration in them, to begin with, would they?

Mr. Sharpe: We object to the question, first, as leading. Secondly, because it is calling for a conclusion. Thirdly, it is not based upon any knowledge or any predicate which would authorize him to give it.

The Court: Sustain the objection.

By Mr. White:

Q. Can you state to the jury what these melons should have brought had they arrived at Chicago, Illinois, for the morning of the 16th in Chicago, June 16, 1958, had they arrived in good condition?

A. They should have brought our invoice price there.

Mr. Sharpe: He can answer that yes or no. We object to it. If he will answer it, why, then, I'll make no objection.

By Mr. White:

Q. Let me ask the question in this regard: Disregarding the sale, on your knowledge of the market reports—and I think you did state that you kept abreast of the sales daily—can you testify what these melons should have brought in Chicago on June 16—and you can refer to your [fol. 69] market reports for that purpose—had they arrived at Chicago for the market of the 16th in good condition?

The Court: Now, in regard to that question, you can answer yes or no, as to whether or not you are able to testify.

and do not answer as to any price or value and give counsel for defendant a chance to object.

A. Yes, I can tell from this market here—market report here.

Mr. Sharpe: We then renew the objection, Your Honor, if he pursues that, on the ground that he has not related this particular shipment there to anything that is covered by the U. S. D. A. Market Reports.

The Court: I believe the objection is good.

Mr. White: I don't quite understand that objection; that I haven't related—

The Court: As I understand— May I see counsel just a minute at the bench?

Mr. Sharpe: Yes, sir.

Mr. White: Yes, sir.

(Informal discussion off the record at the bench.)

[fol. 70] By Mr. White:

Q. Mr. Baker, let me rephrase my question. What price were honeydew melons from Texas in—that is, good quality and condition melons—bringing in Chicago, Illinois, on the Market of June 16, 1958?

A. Well, the only thing I have to go by is this report here, which is supposed to cover the market. Texas flat crates, jumbos or standards, 9s, four to four and a quarter.

Q. What size melons are these in this particular shipment?

A. Well, I'd have to see the manifest there.

(Instrument handed to the witness by Mr. White.)

A. These are standard nines. There are nine melons to the crate.

Q. Nine melons to the crate?

A. Yes, sir.

Q. And they were bringing from four to four and a quarter?

A. From four to four and a quarter.

Q. Now, I will refer to Count II here, which is a carload of melons out of Rio Grande City on June 1, 1958, 640.

crates. Do your records show what size melons those are? I believe the account of sales does.

[fol. 71] By Mr. White:

Q. Now, this shipment was billed out on June 1st, was it not?

A. Yes, sir.

Q. And where was it billed originally?

A. Billed to Elmore & Stahl, St. Louis.

[fol. 72] Q. And then diverted when?

A. Diverted on June the 3rd to York & Whitney in Boston.

Q. To York & Whitney in Boston?

A. Yes, sir.

Q. Is that where it eventually sold?

A. Yes, sir, it eventually went to York & Whitney.

Q. And state what type of sale arrangement you had with York & Whitney?

A. Well, let me look here. That was sold on a joint sale.

Q. And what price was received—

Mr. Sharpe: Excuse me. May I confer with counsel just a moment, Your Honor?

(Informal discussion off the record.)

Mr. Sharpe: We object to any agreement between Elmore & Stahl and the consignee or a person on the joint account that we're not shown to have notice of, Your Honor.

Mr. White: Your Honor, these records have been in the possession of counsel for many months.

The Court: May I confer with counsel?

Mr. Sharpe: Well, now, I don't think that is right.

The Court: May I confer with counsel just a minute?

[fol. 73] Mr. Sharpe: Yes.

Mr. White: Yes.

(Informal discussion off the record.)

Mr. White: Your Honor, we haven't gone through these various instruments with the jury. I might do that at this time and clarify some of these matters. It seems that we

are getting a little bit out of order in our introduction of proof. The jury is not aware of the fact that we have the account of sales in each of these cars offered into evidence with the stipulation that if the consignee were present in court he would testify that—

The Court: You might ask the witness, if you desire, what each instrument is, and show it to the jury. You have that right.

Mr. White: Well, that is what I was getting into.

The Court: It's been introduced in evidence under the stipulation that they were admissible. There's been no testimony concerning any of the instruments, I'll grant you that.

[fol. 74] By Mr. White:

Q. This instrument in Count II, which has been identified and introduced into evidence, Mr. Baker, as "Plaintiff's Exhibit No. 3," that is the account of sales, is it not, which shows what that particular shipment brought on the sale by York & Whitney in Boston, Massachusetts?

A. That is right, yes, sir.

Mr. White: (Speaking to the jury) And that instrument has been admitted into evidence by the Court, with the stipulation by counsel on both sides that if the consignee—York & Whitney—were present in Court, they would testify that this price that they received was the value of that commodity at the time and in its condition on arrival. In other words, in the condition that these melons were in when they arrived at Boston and at the time that they arrived, that that was the price they received. In this instance, they brought \$2,736.25.

By Mr. White:

Q. The next instrument, Mr. Baker, shows to be an inspection certificate prepared by the National Perishable Inspection Service in Boston, which shows the condition of the commodity upon its arrival at destination. Now, I will [fol. 75] address my remarks to you with reference to that inspection certificate, Mr. Baker. It does show, does it not,

that this particular ear arrived in Boston, showing that the load had shifted and that many of the crates were out of alignment and that from zero to eleven, average four per cent, of the melons were seriously bruised?

Mr. Sharpe: If the Court please, I don't object to anything that would clarify these issues for the jury and will keep these various shipments straight, but I do object to counsel picking up an instrument which the jury can read and picking out the portion he thinks is favorable to him and emphasizing it and not reading the rest of it. If he wants to read it all, I won't object to that, but I object to him doing it piecemeal.

Mr. White: Your Honor, I don't know whether it's your practice to read all these instruments,—

Mr. Sharpe: Well, he didn't read the part that said, "no decay," for example.

The Court: All right, I think counsel may do that. If you have any questions about the instrument, you may ask [fol. 76] them. I think the jury, of course, can read the instrument in its entirety.

Mr. White: Surely.

By Mr. White:

Q. In your examination of that inspection certificate, Mr. Baker, would you state whether or not that particular shipment arrived in good condition?

Mr. Sharpe: We object to that as calling for a conclusion without any showing as to the standards used and the term "good condition" or that this witness knows them and is qualified to express an opinion.

The Court: Without showing the witness's qualifications, I believe the objection would be good.

By Mr. White:

Q. Mr. Baker, can you determine from your own knowledge, from examining that inspection certificate, whether or not— Well, are you familiar with the condition in which the melons should arrive?

A. Well, I am not an expert on that. I do know that after they arrive in good condition,—

Q. Now, what factors affect the salability of melons when they arrive at these markets? Are you familiar with that? [fol. 77] A. Well, I am familiar with this much, that they have got to be sound melons and they have to have a good appearance.

Q. And what factors in the way of appearance detract from their salability?

A. Well, bruises, sunken spots or sunken places, you might say, or places that show decay or discolorations.

Q. All right. You say "bruises"; do you find any indication on that inspection certificate that these melons were in a damaged condition as the result of bruising?

A. Yes, there is a place on here for that. It says, "BRUISING: Range zero to eleven, average four per cent seriously bruised melons. This bruising independent of pack bruising."

Q. Now, can you tell from examining that instrument, can you give an estimate as to the cause of that bruising, an opinion?

Mr. Sharpe: You mean the cause in this case, or generally?

Mr. White: The cause in this case.

Mr. Sharpe: Well, we object to it unless he has personal knowledge of it.

The Court: Sustained.

[fol. 78] Mr. White: Your Honor, I believe there is enough information on that inspection certificate that a man familiar with the business and familiar with inspection certificates can give an opinion.

The Court: May I see counsel just a minute?

Mr. Sharpe: Yes, sir.

Mr. White: Yes, sir.

(Informal discussion off the record.)

By Mr. White:

Q. Now, you have mentioned that discoloration does detract from the salability of them?

A. Yes, sir, discoloration detracts.

Q. Now, this shipment was due for the market of June 9, was it not, 1958?

A. The inspection was made, due the 9th.

Mr. Sharpe: I'll stipulate that with counsel, Your Honor, if he wants to, that the car was due and available for June 9, 1958.

The Court: All right.

By Mr. White:

Q. Now, that is the first market for which the car was available; you state that you are familiar with the market reports and you have the market report there for Boston, [fol. 79] Massachusetts, for June 9, 1958?

A. Yes, sir.

Q. Can you state what good quality and condition honeydew melons out of Texas were bringing on the market of Boston on that date?

A. Well, the range on that date, on various sizes, was four to four—

Q. Let me interrupt you. I think the record shows that these are 9s and 12s.

A. Nines and twelves? Nines, four and-a-half to \$5.00. Twelves, five to five and-a-half. Mostly five and-a-half.

Q. In other words, according to the top market there on honeydew melons, there were a hundred and twenty-eight crates, were there not, of No. 12s at \$5.50, which is the top market, you testified; they would bring \$704, for the 12s; 512 crates of No. 9s at \$5.00 would bring \$2560, or a total of \$3,264; isn't that correct?

A. Well, if your figures are right. I don't know; I'd have to—

Q. Well, you might check our figures on that. (Counsel hands the instrument on which he was figuring to the witness).

A. Is this the manifest here? That is true, the sale should [fol. 80] have been \$3264.

Mr. Sharpe: If the Court please, I understand what good quality and condition 9s and 12s, generally— He's not— He's answering the questions generally?

The Witness: That is right.

Mr. White: That is correct.

My Mr. White:

Q. What loss would that show, based upon that value as opposed to the sales value?

A. We had a loss of \$527.75.

Q. That is on Car No. 2 that went to Boston, Massachusetts?

A. Yes.

Q. Now, on Count III, a shipment out of Rio Grande City on the 16th day of June, 1958, the bill of lading indicates that the railroad received 560 crates of melons from Elmore & Stahl at that location on that date and according to the bill of lading receipted for them in apparent good order. The diversion order which has been offered in evidence shows that it was diverted on the 19th; is that not right?

A. That is true, yes, sir.

Q. And diverted to York & Whitney, I believe, again?

A. Yes, sir.

[Vol. 81] Q. And we have the account of sales here which shows that these melons brought a total of \$1,063.90 upon arrival at destination?

A. Yes, sir.

Q. Again I show you the inspection certificate at Boston, Massachusetts; would you read to the jury from that instrument the amount of bruising, if any?

A. "Range zero to twenty-five, average six per cent, seriously bruised melons in good order crates. This bruising independent of pack bruising."

Q. Also, on that inspection certificate it shows these melons to be fairly good quality; does it not?

A. Yes, that is what it says. Yes, sir.

Q. Now, Mr.—

Mr. Sharpe: I didn't quite get the witness's answer.

The Witness: Yes.

Mr. White: "That is what it says."

By Mr. White:

Q. Mr. Baker, this shipment was due and available for the market of June 25th in 1958 in Boston; you have the market reports issued in Boston on that date and do you have the records there showing what sizes these melons are?

A. Well, Texas honeydew crates, 8s, two-seventy-five [fol. 82] to \$3.00; 9s, two-seventy-five to three. One mark best three and-a-quarter 12s. Three and-a-quarter, yes, 12s, two-seventy-five to \$3.00. Mostly two-seventy-five.

Q. Now, these melons show on the account of sales— Does your record show what size melons are involved in this shipment?

A. Fifty-one three nine five?

Q. Yes.

A. That was a straight car of 8s; 560 crates of jumbo 8s.

Q. These are all jumbo 8s?

A. Yes.

Q. And what were they bringing in good quality and condition?

A. Eights, two-seventy-five to \$3.00. Two-seventy-five to three.

Q. Now, basing the sales price there on \$3.00, which I believe you testified was the top price, what would those melons have brought in Boston on that date?

A. Sixteen—

Mr. Sharpe: Now, if he's asking about these melons, Your Honor, I object to it, because of the lack of relation [fol. 83] of quality and condition. If you ask him generally, I won't object to it.

By Mr. White:

Q. Well, generally, good quality melons out of Texas in Boston on that date of June 25th at \$3.00, what would they have sold for?

A. It would have been \$3.00 a crate; \$1680.

Q. And they sold for how much?

A. \$1,063.90.

Q. For a loss of?

A. \$616.10.

[fol. 87]

Cross examination.

By Mr. Sharpe:

Q. Mr. Baker, where do you live?

A. I live in Pharr, Texas.

Q. Where?

A. Pharr. Pharr, Texas.

Q. How far is Pharr, Texas, from Rio Grande City?

A. About thirty-five miles.

Q. And where is the principal office of Elmore & Stahl located?

[fol. 88] A. In Pharr.

Q. Is the operation of Elmore & Stahl at Rio Grande City a seasonal operation?

A. In the packing, it is, yes, sir.

Q. In the packing, you say?

A. Yes, sir.

Q. The evidence here, of course, shows that in the Month of June, 1958, four shipments were made from Rio Grande City by Elmore & Stahl by rail; three of these shipments were of honeydew melons, and the fourth of peppers. Now, during that period of time,—that is, in the month of June—Mr. Baker, where were you primarily located? Where were you working?

A. In Pharr.

Q. I think yesterday you testified that your title was Office Manager?

A. Yes, sir.

Q. And in that position you are not primarily concerned with purchasing and processing and shipment of melons or peppers, are you?

A. No, sir.

Q. Somebody else for Elmore & Stahl—one or more persons—handle those phases of the business?

A. That is right, yes, sir.

[fol. 89] Q. Who would be the man with Elmore & Stahl who would have been in charge of the operation in Rio Grande City in June of 1958?

A. Harold Hess.

Q. H-e-double s?

A. Yes, sir.

Q. What is his title with Elmore & Stahl?

A. He's the Shed Foreman, Shed Manager.

Q. Is Mr. Hess— Or, was Mr. Hess the Shed Foreman only at Rio Grande City for Elmore & Stahl, or did he work for the company at other places?

A. Only at Elmore &— Well, at Elmore & Stahl in Rio Grande City, and he also works in Mexico.

Q. Would you say he works more at Rio Grande City, or more in Mexico, or how is it divided?

A. Well, it's on a seasonal basis. He probably spends more time in Mexico than he does in Rio Grande City.

Q. In any event, in June of 1958, when Elmore & Stahl were conducting its shipping operation on honeydews and peppers, Mr. Hess was the Shed Foreman?

A. That is right, yes, sir.

Q. Where is Mr. Hess today?

A. He is in Mexico.

Q. What part of Mexico?

A. At Apatzingan.

[fol. 90] Q. That is about 876 miles south or southwest of Laredo, isn't it?

A. Yes. It's southwest of Mexico City.

Q. I believe you testified yesterday that you do not claim to have any personal knowledge of any of these four shipments which went out of Rio Grande City in the Month of June 1958?

A. Not specifically, no, sir.

Q. Mr. Baker, are you generally familiar with the method of harvesting honeydews in the Rio Grande City area?

A. Yes, I am.

Q. Well, let's see if this is a fairly accurate summary of it: The honeydew melon is grown on a vine, is it not?

A. Yes, sir.

Q. And out in the field, the honeydew first has to be cut from the vine; is that correct?

A. That is true.

Q. That is done by field hands?

A. Yes, sir.

Q. Out in the field?

A. Yes, sir.

Q. And when the honeydew is separated from the vine, what is it put into, generally—a sack or a box?

A. It's picked up from the ground in a sack, first.

[fol. 91] Q. Picked up by hand, isn't it?

A. Picked up by hand and put in a sack and loaded in a truck.

Q. It's placed in a truck?

A. Yes, sir.

Q. And usually, they carry— What size loads, usually, of melons will they carry in their trucks?

A. Those trucks are especially constructed with sideboards about eighteen inches high and they are padded inside. They have a removable tailgate that slides forward. As the truck is loaded, the harvest hands go up a ramp at the back of the truck and to start the truck, the tailgate is moved forward to the front portion of the bed, and then that portion is loaded or the melons are taken from the sack and as that portion is loaded, the tailgate gradually is pulled backwards.

Q. The melons are dumped into the trucks from the sacks?

A. They are poured into the truck from the sacks, yes, sir.

Q. And are you generally familiar with the fields or farms in the area of Rio Grande City where honeydews are grown?

A. Yes, sir.

Q. About what distances would be involved there, Mr. [fol. 92] Baker, from the packing shed?

A. Five to— We have one field that is only one mile from the packing shed. The other is five miles.

Q. And those trucks travel sometimes on dirt or gravel roads, sometimes on pavement, do they not?

A. That is true, yes, sir.

Q. And after the truck with a load of honeydew melons arrives at the packing shed, the melons, Mr. Filipot said,

were dumped from a truck over into some kind of receiving bin, I believe?

A. Yes. Would you like for me to explain that?

Q. Yes, sir. Yes, sir.

A. The receiving platform is a large platform that is about forty feet long and fifteen feet wide, has a gradual slope to it, and you might say this table here is the receiving platform and it's tilted slightly so the melons will roll down to a belt here (indicating). The platform is padded. The trucks come along the side there on a—there is a dirt mound we have built up so the truck will tilt as it comes up to the platform, and on the side of the bed we have one—that one side of the bed opens up, or there is one board along the edge that they can release, and it comes down and releases right on top of this platform and then the melons [fol. 93] roll right out of the truck into the platform here (indicating).

Q. What distance do we have involved there, where the melons roll from the truck down to the conveyor belt?

A. From the farthest point, I would say twelve to fifteen feet.

Q. Yes, sir. And then yesterday Mr. Fillpot testified generally about what happens after that; that is, the melons do go through a brushing machine, don't they?

A. Yes, they do. They go from the platform onto a belt, a wide belt here (indicating), that is moving all time. The melons gradually are moving all time and they go into an elevator and there is a brush there that loosens the dirt. They go back onto another belt and into the packing bins.

Q. That belt you are talking about is made out of what?

A. It's made out of belting material, cotton material, reinforced with nylon or cotton.

Q. What causes it to move, Mr. Baker—a series of rollers?

A. No; there is a motor at one end, and the belt either moves on a flat surface or it has rollers under it that support the load.

[fol. 94] Q. Are the melons graded for size somewhere along the process?

A. The melons are graded for quality. When they come out of the brushes they go over what we call a "grading table," and the melons— The grading table has rollers on it that revolves in a motion opposite from the direction that the conveyor is moving. This grading table is approximately four feet wide. The people stand on both sides of the grading table. There are fluorescent lights over the table so there is good visibility, and these people stand beside it there and as these melons go over the rollers, the rollers cause the melon to rotate so that the complete melon will be visible. As the melons move along there, the ladies and men that are—they have—anything that would cause them to not be good grade or quality, they put them in the cull-bin.

Q. Of course, at that stage, what is kept, what melons are rejected, is in the judgment of the grader that is doing that particular job at that particular time?

A. The shed foreman is responsible for the grade.

Q. Is that Mr. Hess?

A. That's Mr. Hess, yes, sir.

Q. And after they are graded, what is done with the [fol. 95] melons, Mr. Baker?

A. The melons come out from the grading table onto a belt that runs about fifty or sixty feet long. It's a wide belt about thirty-six inches wide and they roll into a large bin that is about ten feet deep, similar to this table here, you might say. It's slightly tilted. It's padded. On this edge down here (indicating), there is a board up about six inches high to keep the melon from going out on the floor that has a heavy pad on it. This belt moves along— The melons move along this belt and there is a board that's hooked onto the frame that shear the melons off, when they come up to this point (indicating). Then they—

Q. Excuse me. Is that a machine-operated board?

A. No; it's a hand-operated board. It's merely a side. It shears the melons off into this bin here (indicating). Actually, the belt is moving very slowly, and there women—there's one particular woman that all she does is keep the bins full. In other words, she'll run the melons into this bin. When it fills up, she'll come back and open up another one and she'll come back and roll it into another bin.

Q. Let me ask you at that point, how many layers of [fol. 96] melons do you have at that stage?

A. One layer.

Q. One layer?

A. Yes, sir.

Q. Just go ahead, please.

A. Then the packers are located at the bottom side of the bin. They size the melons as they pack. They will look— They are trained men that you don't learn this in books or anything; it's just a matter of—it's a knack for being able to pick out sizes that fit in a certain number in a crate. If they look at their bin, a good packer can look at his melons there and he will say he's going to pack a crate of 12s. He will pick out all the sizes there where they will fit snugly in the crate.

Q. In Counts I and II and III of this case, we have 640 crates—if I say "cartons," I mean "crates." What are those crates made out of?

A. They are made out of wood.

Q. Can you describe that crate to us?

A. Yes, sir. We have three size crates. I might mention three sizes. The most usual sizes for melons are what we call a "jumbo" crate and a "standard" crate. A jumbo crate, naturally, is larger. The ends are made out of a [fol. 97] solid piece of wood, not quite as heavy as this table here (indicating exhibit table). I think it's 11/16ths thick. It's sixteen inches long; as well as I recall, seven and three-quarters inches deep, and, of course, the crate has two ends. The sides are made out of a solid piece of material or wood that is made from white pine material. It is cut 5/16ths inches thick. The bottoms are made out of two-slats the same thickness. The crate is twenty-three and-a-quarter inches long, or twenty-three and-a-half inches long, depending on the tariff.

Q. Which crate is this, Mr. Baker?

A. Both the jumbo and the standard are the same width and length.

Q. Twenty-three?

A. Twenty-three and-a-quarter inches outside measurement. The standard crate is an inch shallower than the jumbo crate.

Q. One inch?

A. One inch.

Q. Now, let me ask you: The ends of these crates, of course, are solid, are they not?

A. They are solid, yes, sir.

Q. But the sides of the crates are made up of slats?

A. The sides are solid wood. We call them "slats" [fol. 98] because of the thickness. They are 5/16ths inches thick. Or the tariff says "sides"; it doesn't say "slats." It says "sides," are made up of material that has to be a certain specification, according to the tariff.

Q. Yes, but the question I am asking you, Mr. Baker, is: Is the side of this crate solid, or is it split up into slats?

A. It's a solid piece.

Q. One solid piece?

A. One single, solid piece, yes, sir.

Q. That is the type of container we are talking about in each of the counts that we have here that included honeydews; is that right, sir?

A. Yes, sir.

Q. And after the packer puts the honeydews into these crates and, as you say, he has to size them up and determine what number he will put in there, what happens to the crate of honeydews then?

A. I might mention one thing here that we need to complete the packing of these crates. The bottom of the crate is filled with excelsior, which nests the melons into the crate and is purposely put there to protect the melon. After the crate is packed, it is set off the packing hump, [fol. 99] what they call their packing hump, a little stand they put it on while they are packing it. They lift it off that hump, put it on a moving conveyor which carries the crate on down to the other end of the shed for lidding.

Q. Let me ask you about that excelsior matter there. Is the excelsior just on the sides, or does it appear elsewhere?

A. You can see the excelsior from the top of the crate. The melons are, naturally, nested into the excelsior. We have girls along the line that pull off the loose ends so that it won't have a bad appearance, so that it will have a neat-looking packing.

Q. Would you say that most of the excelsior is at the bottom with some lapping over the sides?

A. Yes, sir; the biggest part of the excelsior is on the bottom, yes, sir.

Q. Would you say that the crate goes down the conveyor after it's packed to the lidding machine?

A. Yes, sir.

Q. Would you describe that lidding machine to us?

A. The lidding machine that we use— There are a number of different types—a nailing machine and a lidding machine at the same time, it's a combination at the same time. As it comes into it, when the machine is put into operation, the lid is placed on the crate and the nail is [fol. 100] driven into the end of the lid to fasten it to the box.

Q. And after that, what happens?

A. The crate is set off from the conveyor to the floor. They are stacked up into, I believe, five crates high. They are set off according to size, and then we have men with clamp trucks or hand trucks that come in and get all of those crates and truck them into the cars.

Q. What is the average weight of a crate such as we have in each of these three honeydew shipments, 640—

A. Forty-five pounds.

Q. Forty-five pounds?

A. Yes, sir.

Q. Is that crate usually handled by one man?

A. How do you mean, "handled"?

Q. When it's moved from place to place, such as off of a conveyor belt onto the truck where it's to be carried?

A. Yes, sir, one man handles that. He sets it off the conveyor.

Q. And do you ever have a conveyor belt that runs directly into the railroad car?

A. No, sir, not in this case.

[fol. 101] Q. The crates of honeydews are taken from the place where the lid is put on them in trucks?

A. In clamp trucks.

Q. Clamp trucks?

A. Yes, sir.

Q. What's the difference between a clamp truck and any other kind?

A. A clamp truck has a device at the bottom that has two arms sticking out from the bottom of the truck. It has two small lips. These two arms are made out of metal. They are small, about this wide (indicating). They shoot out from here and there is a small lip welded onto the end of each truck and this device that—it's fixed in such a manner that when he brings the truck up to pick up the crate, he puts his foot on a thing that makes it go under the crate that is on the bottom of the stack and in that manner, he can lift the whole stack and the whole stack will lean back against the arms of the clamp truck.

Q. He lifts the whole stack at one time?

A. Yes, sir.

Q. That is usually what?—five layers or five crates?

A. Yes, sir.

Q. And they have been stacked up there by hand, have they not?

[fol. 102] A. Yes, sir.

Q. Now, when the clamp truck gets the layer or stack of honeydew crates over to the railroad car, how are they unloaded in the railroad car, itself?

A. They are taken into the car and the trucker, the man that is operating the clamp truck, releases a stack right in the car near the loader, wherever he happens to be in the car, in the end or it depends on where he is working.

Q. Does the truck drive into the car?

A. The truck doesn't drive. The man pushes the clamp truck into the car and sets a stack up, releases his load and goes back out again.

Q. Then he turns it over to the loader, doesn't he?

A. That is right.

Q. Now, I believe that all these loads in Counts I and II are the same. If they are not, why, I wish you would look at the papers here and correct me on it. Let's take Count I. The inspection at Chicago— By the way, there was no inspection made by the United States Department of Agriculture of any of these three loads of honeydews at Rio Grande City?

A. No, there wasn't.

Q. By your answer, you mean there wasn't any made?

A. No, there was none made at Rio Grande City.

[fol. 103] Q. Yes, sir. So, let's look at the inspection certificate at Chicago. It says, "eight layers, four rows, crosswise." Now, could you describe that a little bit more in detail for us?

A. Eight layers crosswise?

Q. Eight layers, four rows, crosswise.

A. Let me see that just a moment.

Q. Would you like to look at it?

A. Yes, sir.

Q. And, if it would help any, Mr. Baker, we've got a blackboard and some chalk there; you might draw it out if it would illustrate it better.

A. Well, this refers to the manner in which the car is loaded, and the inspection at Chicago, they always state what the appearance of the car is.

Q. Yes.

A. And it's eight layers; that means that there are eight crates high. There's one on top of another for eight high, and there's four rows, which means there's four rows in the car, the full length of the car. "Crosswise" means that the crates are loaded end to end across the car. Do I make myself clear?

Q. I think so. By "eight layers," that means that you have eight crates of honeydews, one on the bottom and [fol. 104] seven on top?

A. That is right.

Q. And the "four rows" means lengthwise down the car?

A. There are four rows of them lengthwise.

Q. And the crates would be crosswise?

A. Crosswise.

Q. Instead of endwise?

A. That is right.

Q. Now, with reference to that statement that in the car in Count I you had eight layers, does your man with the clamp truck usually pick up as many as eight in a layer?

A. No, sir.

Q. He would pick up how many?

A. He would pick up five. They usually stack those five

every time because he can't carry more than that many on the load.

Q. So when the clamp truck gets this layer of five crates of honeydews into the car, then somebody has to put three more in this type of load by hand, don't they?

A. The trucker doesn't actually position the crate in the car; he only brings the car to the loader and the loader takes these individual crates and places it in position in the car and if he's loading a car eight high, well, they [fol. 105] are eight high. This car happens to be eight high.

Q. Well, they start at one end?

A. They start at one end of the car, yes, sir.

Q. Well, from either end and work toward the middle, don't they?

A. That is right, yes, sir.

Q. So what you would have in this case in Count I, where you have eight layers, the clamp truck would take a layer of five crates into the railroad car and they would be positioned, starting down at the end, and then as the loaders work back, they put three more by hand on top of each layer; is that right?

A. I don't know what you are trying to drive at.

Q. I'm just trying to find out how they load the eight layers of crates of honeydews into this car.

A. This loader takes the crates and starts on the bottom and he loads across the car, crosswise. He has bracing material he puts in between the crates as he goes along, and we tell him—or Hess tells him—how many crates he wants to load in this car, and he figures out from how many crates he wants to load; that determines how high he's going to go, because the floor space remains the same. You see what I [fol. 106] mean? If he's going to load five forty, he wouldn't go eight high; he would only go seven high, perhaps.

Q. Yes, sir. Now, let me be certain about the width or depth, whichever is the correct word of these crates. Is it seven and-three-quarter inches?

A. Yes, sir.

Q. So that when a man has five, the loader in the railroad car has five of these crates piled on top of each other; he has a little bit less than forty inches, doesn't he, whatever five times seven and-three-quarters is?

A. Yes.

Q. Three and-a-half feet. Then he has to take a crate, I suppose one at a time, and put on top of that layer as he works up to eight; is that correct?

A. Yes, sir.

Q. And when he gets to eight, he's got something over sixty inches there?

A. Well, I don't know how high it is.

Q. It would be five times seven and-three-quarters, wouldn't it?

A. The whole purpose of loading what you can in a car—

Q. Or eight.

A. There is a minimum weight that you must make to get [fol. 107] the proper freight rate. Naturally, we try to get as close to our minimum weight as we can, because, otherwise, you would pay excessive freight. You wouldn't want to load a car half loaded and have to pay the same amount of freight as you would fully loaded.

Q. You usually try to get around 30,000, don't you?

A. On melons, I don't— Let's see the bill of lading. These are billed at 640 crates, 29,440 pounds.

Q. Now, you mentioned a while ago, Mr. Baker, that the loaders in the cars use some kind of bracing material; would you go into a little bit more detail about that? Tell us what kind of material it is and how is it placed against the crates or on them?

A. This bracing material is recommended by the railroad; it's in the railroad tariff.

Q. Mr. Baker, would you pay attention to what I am asking you. I just asked you how the loader in the car loaded these in there; I didn't ask you anything about railroad tariffs. You've got a lawyer here; he can develop that if he wants to. My question to you is not about tariffs, but how the—

A. Bracing material is— Let me see how I can explain this a little clearer. The bracing material that we use are pieces two-by-two, approximately—well, they are about [fol. 108] seven feet long, six or seven. I'm not sure about the dimensions on the thing. But they are cut out of— They are two-by-two square and six or seven feet long and they are high enough to go up above or to the top of your

load. When a man starts loading, they are specially built, what we call "corners." There are two pieces that are two-by-twos that are nailed together with a block on each end that fits right into the corner. And then the crate, when it's loaded, the square corner of the crate will fit right into this position in—it's a little nick right in there, you might say; it builds a little locket piece. Each corner has one of those, and then as we come along with the crates, there is a divider between each crate which separates the crates a small amount. And these little blocks keep the crates separated and lock them in position.

Q. Now, the bracing that you mentioned there is nailed at certain places to keep it intact?

A. It is not nailed at all, no, sir.

Q. It's laid in there loose?

A. It's locked in position by the crates.

Q. There's no nailing used at all on it?

A. Not in the bracing, no, sir. Not in the Pierce brace [fol. 109] ing.

Q. Now, then, when you come down to the place where the loader has filled the car right up to the center, what type of bracing is used there?

A. That is made— The gate is made from two-by-fours and one-by-fours.

Q. And is the object of that center brace to push each side of the load out as far as possible to keep it tight and intact?

A. The object of the center brace is to keep the load from shifting.

Q. Yes. Now, everything that we've talked about up to now, as far as this loading is concerned, is done by the shipper, isn't it, Mr. Baker?

A. Yes.

Q. The railroad has nothing to do with that?

A. Yes, they do. The railroad doesn't do the work,—

Q. You mean they have employees there?

A. —but they set the rule that we have to follow.

Q. But the employees who do this work are the employees, in this case, of Elmore & Stahl, aren't they?

A. Yes, sir.

Q. Now, you were here yesterday afternoon when Mr. Fillpot testified about gassing these melons, weren't you?
[fol. 110] A. Yes, sir.

Q. Is that actually in your field, Mr. Baker? Do you know anything about that, or would you have to depend on what you have heard or what somebody else has told you about it?

A. I don't know anything about gassing, except that I know you have to gas melons to sell them, honeydew melons.

Q. Especially to improve their appearance, colorwise; that is true, isn't it?

A. Well, they gas— Well, I can only tell you this from the shippers' point of view. You have to gas them to make them edible and have the proper appearance.

Q. To make them edible and have the proper appearance?

A. Yes, sir.

Q. Now, Mr. Fillpot's company is on some sort of a contract basis with Elmore & Stahl, I suppose?

A. Yes, sir.

Q. They are paid by the car, by the hour, or how are they paid?

A. By the car.

Q. By the car?

A. Yes, sir.

Q. In other words, they get the same amount of money, [fol. 111] regardless of what they do on a particular car?

A. Yes, sir.

Q. Have you observed that gassing operation in progress, Mr. Baker, at anytime?

A. Yes, I have.

Q. The tank of ethylene gas and the—the hose, rather, from it, is placed right in the center of the car, is it not?

A. Yes, sir, it's placed in the door of the car.

[fol. 112] Q. Mr. Baker, can you tell us as a shipper's representative what color you want honeydew melons to be on the markets at the time they are to be delivered?

A. A creamy color.

Q. Creamy?

A. Yes, sir.

Q. Do you want any green in them?

A. Not if you can help it, no, sir.

Q. I beg your pardon?

A. No, sir; you would not.

Q. As a matter of fact, one reason—that is one reason for the gassing process, isn't it, to take the greenish or [fol. 113] tingly color out of them?

A. You know, I am not familiar enough with gassing to go over that.

Q. Well, that's all right. You prefer them to be a creamy color?

A. Yes.

Q. How about white?

A. White is all right.

Q. As a honeydew melon gets more mature and riper, what color does it tend to change to?

A. A vine-ripened honeydew has a yellow cast to it.

Q. Well, let's take a melon that has been gassed in a car and shipped for five or six or seven days after it's cut off of the vine and it starts to ripen; let's say it's taken out and not put under refrigeration and kept for a period of time, what color does it tend to take on?

A. I don't think I have ever seen a melon except in the stores here that has been taken out of refrigeration.

Q. You have seen one sometime or another that just keeps on ripening out in the open or not under refrigeration, haven't you?

A. Now, do you mean after it's gassed?

Q. I beg your pardon?

[fol. 114] A. Do you mean after the melon has been gassed?

Q. Well, let's just start with— Yes, yes, one that has been gassed and the color has changed and it's been put out in the open and time runs on it; what color does it tend to take on?

A. I don't believe the color would tend to change any.

Q. You think it would still be white and creamy?

A. I believe it would.

Q. White or creamy?

A. Yes.

Q. Even when it starts to decay?

A. I believe that it would. I don't think it would— Of course, it might show decay spots or show sign of decay, but I don't think the color of the melon, the skin, would actually change any.

[fol. 119] A. There is no plating on the honeydews at all; so we don't have an inspection on honeydews. The appearance of the honeydew sells itself. We only put up the best melons in a honeydew pack. That is the reason we don't have an inspection.

Q. You try to, you mean?

A. We do. We put— We throw, I'd say, from twenty-five to fifty per cent of our melons on—are taken back as culls.

Q. Now, do you have any record— Now, yesterday I saw you with a number of little file folders in here and Mr. White asked you a question about one shipment; you took it and referred to it. Do you have your file folder on these shipments with you?

[fol. 120] A. Yes, sir.

Q. Do you have anything in any of them that would show the kind of inspection or grading that was made on these honeydew melons?

A. No, sir. We didn't have any inspection on them.

Q. In other words, you don't keep those records?

A. We don't have an inspection.

Q. You didn't make them to start with back in June of '58?

A. We did not have any inspection made on the melons by the government.

Q. Now, the man who would really know more about these honeydew melons than anybody else, the ones that were packed back in 1958, would be Mr. Hess, wouldn't it?

A. Yes, sir.

Q. Is he going to be here?

A. No, sir.

Q. Well, now, this case was set for trial—and this Court's docket will show it—on the 6th day of February; it was

officially set by this Court for jury trial on this date. You, as office manager, haven't made arrangements with Mr. Hess to come here and tell this jury about the condition of those honeydew melons?

[fol. 121] A. No, sir, I haven't.

Mr. Sharpe: All right. We later want to offer that docket entry in evidence here, Your Honor.

Mr. White: Your Honor, in that regard, I think we might read into the record—I'd like to get into the record the date that suit was filed, the date in which the Defendant's Answer was filed.

Mr. Sharpe: That's all right.

Mr. White: May we get that from the—

Mr. Sharpe: I prefer to go ahead and present my own case in my own way,—

Mr. White: Counsel brought that point up.

Mr. Sharpe: —and let counsel present his when he gets to it.

By Mr. Sharpe:

Q. Mr. Baker, are you telling us that you have never had a United States Department of Agriculture inspection on honeydew melons that you have shipped from Rio Grande City?

A. That is right.

Q. You never have?

A. No, sir.

Q. In the history of the operation as you know it up [fol. 122] there?

A. We never have had an inspection on them, no, sir.

Q. You are not educated in either horticulture or plant pathology, are you, Mr. Baker?

A. No, sir.

Q. You wouldn't attempt to give us any opinions, therefore, about decay and sunken areas and discoloration or things like that in honeydews, would you?

A. No, sir.

Q. Is there anybody up there at Elmore & Stahl that does know about those things?

A. There is no one that is a pathologist there, no, sir.

Q. Where does Mr. ~~Elmore~~ live?

A. He lives in McAllen.

Q. Where does Mr. Stahl live?

A. Live?

Q. Yes, sir.

A. He lives in McAllen.

Q. Are they up there in Hidalgo County today?

A. Mr. Stahl is in Mexico and Mr. ~~Elmore~~ is probably in Pharr.

Q. You haven't seen them around the courthouse here yesterday and today, have you?

A. No, sir.

[fol. 123] Q. I want to show you the exhibits on Count II, Mr. Baker, of this case, which involves a shipment of honeydews from Rio Grande City on June 1, 1958, and in particular, I want to show you the exhibit which has been marked "Count II—P-4"—that indicates the Plaintiff's Exhibit 4 on this count—and that is the destination inspection certificate made by the National Perishable Inspection Service at Boston, and I want you to look down under the heading "CONDITION"; right where I have my thumb there. Do you see that, sir?

A. Yes, sir, I can see it.

Q. The first notation immediately following the word "CONDITION" is this, isn't it, Mr. Baker: "No decay noted"?

A. That is right.

Q. You see that?

A. Yes, sir.

Q. And then the next notation is: "Range zero to twenty-two, average seven per cent, show light brown discolored areas." Do you see that?

A. Yes, sir.

Q. Now, do you know enough about that inspection certificate or the way these inspectors examine honeydews at destination to tell us what that means? If you don't [fol. 124] know, sir, just tell us you don't.

A. I don't know.

Q. All right. Will you look up under the heading of "BRUISING"? I think it's the third notation. Do you see that?

A. Yes, sir.

Q. Where it says: "Range zero to eleven, average four per cent seriously bruised melons"?

A. Yes, sir.

Q. Now, I want to ask you this, Mr. Baker: When a melon is cut off the vine and the man out in the field picks it up and puts it in a sack, there is an opportunity for bruising there, is there not?

A. Yes, sir.

Q. And when he takes that sack to the truck and rolls it or dumps it or puts it from the sack into the truck, there is an opportunity for bruising there, isn't there?

A. Yes, sir.

Q. And when the truck gets down to the packing shed and the honeydews are rolled out or taken out from the truck onto the receiving bin, there is an opportunity for bruising there?

A. Yes, sir.

Q. And that is true down through the stage there where [fol. 125] the honeydews go into the bin; they are placed by hand over in the crates and when the lid is put on the crates, there is an opportunity for bruising if they are not handled properly at every one of those stages, is there not?

A. Yes, sir.

Q. And when the crates are put into the railroad car and the loader puts them in there, puts the stacks down, and then if he's got five that are taken in there by the little clamp truck, they have to put three more on top by hand, there is an opportunity for bruising there, isn't there?

A. Yes, sir.

Q. And when the bracing material is put in there, there is again an opportunity for bruising, is there not?

A. Possibly.

Q. All right. Now, I wish you would continue to look at that same exhibit that I handed you, Mr. Baker, and look down under "QUALITY, DESCRIPTION, Etc." Do you see that?

A. Yes.

Q. And look at the last—next-to-the-last sentence in that paragraph, and I quote from the report. Now, this is the

report that your own attorney offered in evidence, I quote from it: "Pale whitish green color." Do you see that? [fol. 126] A. Yes, sir.

Q. Now, those honeydews got up there with some green color in them, didn't they?

A. Yes, sir.

Q. And that is not desirable, is it?

A. There is a stipulation on this: it says, "fairly good quality."

Q. Well, that is the next one. I'm just asking you about the color.

A. They would be better if they were cream, yes, sir.

Q. I beg your pardon?

A. It would be better if it had a creamy color.

Q. And the next notation on this report that has been offered by the plaintiff is: "Fairly good quality." Now, you know that there is a difference between a notation of "fairly good quality" and "good quality" and "best quality," don't you, Mr. Baker?

A. The trade usually says, "good quality," "fair quality," and "poor quality."

Q. Well, suppose we start at what you think the trade uses to designate the very best quality that you can have. What's the very best quality that you can have? Is that the word that is used, or is it some other word?

[fol. 127] A. I believe these inspections usually say "good quality," their top quality. They don't go into classifications of good quality.

Q. They do not?

A. I don't believe. They say, "good quality."

Q. Well, the way you understand it, Mr. Baker, what is the word or the term that is used in the trade to describe the very top, best quality of honeydews? If you don't know, it's all right; you may say so.

A. Well, the reports show on the reports; I have heard them described as "beautiful."

Q. You are in the trade of selling honeydews, aren't you?

A. I'm not a salesman, no, sir.

Q. You're not?

A. No, sir.

Q. Well, am I asking you about something you really don't know about here?

A. You are asking me about something that I am not familiar with directly.

Q. I see. Well, I don't want you to testify about anything you really don't know about. So I will ask you this one further question, then: Can you tell us the difference between "good quality" and "fairly good quality"?

[fol. 128] A. I would say "fairly good quality" is not quite as good as "good quality."

Q. All right. And you wouldn't ordinarily expect fairly-good-quality honeydews to bring the top market, would you?

A. No, sir.

Q. Now, I'd like to trade you the exhibits on Count III which involves a car of honeydews that were shipped—that was shipped on June 16, 1958, from Rio Grande City, and call your attention to the exhibit which is marked "Count III—P-4"—that means the plaintiff's Exhibit 4 on Count III. I'd like to hand you that, sir, and that again is the National Perishable Inspection Service destination report about these honeydews at Boston. Now, will you look under the heading "QUALITY, DESCRIPTION, Etc." and look at the last line and see if I quote it correctly: "Most melons yellow." Do you see that?

A. Yes, sir.

Q. That is not desirable, is it, Mr. Baker?

A. Yes, a yellow, creamy to yellow melon is all right. It all depends on what he means by "yellow." There are so many variations of yellow.

Q. Is this tablet that I am holding here a shade of yellow?

[fol. 129] A. Yes.

Q. Is this file holder a shade of yellow or not?

A. I would say so, yes.

Q. Well, now, look at the last sentence again under "QUALITY, DESCRIPTION, Etc." on this inspection report.—this is on Count III—where it says: "Balance pale whitish green color." Do you see that?

A. Yes, sir.

Q. It's got some green in those melons again?

A. Yes, sir.

Q. Maybe Mr. Fillpot didn't gas it long enough; could that be possible?

A. He has to— Well, now, that's his opinion. I don't know.

Q. Now, on "CONDITION" in that car, look at the notation which says: "Range zero to twenty-five, average between two and three per cent soft rot decay." Do you see that under "CONDITION"?

A. Yes.

Q. And then the last sentence in that same—under that same heading says: "Range zero to twenty-five, average six per cent internal breakdown." Do you see that?

A. Yes, sir.

[fol. 130] Q. Now, Mr. Baker, do you have anything in writing that you can show the Court and the jury that will disclose how much soft rot decay these horseydeus had in them at Rio Grande City or how much internal breakdown they had in them at Rio Grande City, Texas?

A. As far as I know, they didn't have anything, no internal breakdown.

[fol. 131] By Mr. Sharpe:

Q. Mr. Baker, during the recess I have looked at the little file folders you gave me and contents and there are some of these instruments that I want to offer in evidence. Now, so we can keep this thing as straight as possible, bearing in mind that we have four shipments here, I will hand you the papers on Count I. Will you give us the refrigerator car number there, please, sir?

A. ART 35042.

Q. All right, sir. I have your file here on that car in that shipment, 35042?

A. Yes, sir.

Q. I just wanted you to identify it. Now, in the file there is a form which is headed off: "ELMORE & STAHL, PHARR, TEXAS," with the car number, ART 35042, with a number of notations on them and I'd just like for you to look at that for a moment. Is that a record on this shipment that was kept in the usual course of your business?

A. Yes, sir.

Mr. Sharpe: Mr. Reporter, will you mark that "Defendant's Exhibit No. 1" in connection with Count I?

(Whereupon the instrument referred to was marked for identification by the Court Reporter as follows: "Count I—Defendant's Exhibit No. 1.")

Mr. Sharpe: We offer it.

Mr. White: No objection.

[fol. 133] (Whereupon "Defendant's Exhibit No. 1" in connection with Count I was received in evidence. Please refer to INDEX TO EXHIBITS for location of this instrument in this STATEMENT OF FACTS.)

By Mr. Sharpe:

Q. All right, sir. I believe that is all I will offer on Count I and I will hand it back to you. Now, it's going to be a little difficult for me to ask you questions about this instrument, Mr. Baker, without both of us looking at it.

Mr. Sharpe: Could I stand right there for just a second where we both can look at it?

The Court: You may.

By Mr. Sharpe:

Q. This instrument is marked "Count I—D-1"; can you see it there all right, Mr. Baker?

A. Yes, sir.

Q. And up at the top left-hand corner is a notation: "E and S"; what does that mean?

A. That denotes the brand.

Q. The Elmore & Stahl Packing Company have a number of brands that they use; what are they known as?—trade names or trade brands, or what?

A. We have trade brands which are registered brands.

Q. And there is a notation on the right-hand side: "Car ART 35042" and over on the left: "Start Load 6/10"; that would be June 10 at "1:00 o'clock p.m., 1958." Do you see [fol. 134] that?

A. Yes, sir.

Q. And "Completed Load 6/10 4:45 p.m., 1958." Do you see that?

A. Yes, sir.

Q. In other words, that loading process there took three hours and forty-five minutes?

A. Yes, sir.

Q. That was a full carload of honeydew melons?

A. Yes, sir.

Q. Now, then, over on the right-hand side—of course, the jury will have this to study later on—you've got some notations, it says: "Sunsilt"?

A. Sunsilt, yes, sir.

Q. What does that mean?

A. That is the name of the farm where the melons came from.

Q. All right. And underneath that, would that be a brand name?

A. No, sir; that would be the name of the farm, Sunsilt Farm.

Q. Then you have "E & S"?

A. Yes.

Q. That indicates a farm that belongs to Elmore & Stahl on which these honeydews were produced?

[fol. 135] A. That does, yes, sir.

Q. Same thing with Sunsilt?

A. Sunsilt is owned by another man.

Q. Then you've got two notations of "Sunsilt"?

A. Yes.

Q. Then you have in a column here various notations; what are those?

A. Those are the number of crates loaded in each tier.

Q. Number of crates loaded in each tier; that is, inside the railroad car?

A. Yes, sir.

[fol. 136] Q. And you have testified that indicates— Is the "E & S" brand printed on the crate or the cover? Where does that appear?

A. It's labeled on the end of the crate. It's our top brand, E & S.

[fol. 156] Redirect examination.

[fol. 157] By Mr. White:

Q. In your experience in handling these matters, have you seen several of these inspection certificates?

A. You mean at origin?

[fol. 158] Q. At destination.

A. Yes, sir. I see all of them that come in.

Q. And are you familiar with the effect of these conditions upon the market value of the commodities?

A. Yes, sir. If you have decayed produce, you certainly can't get top price for it.

Q. Have you developed in your experience in this business over seventeen years a general knowledge of what causes the decay in some instances?

A. Yes. Improper refrigeration, I would say.

[fol. 163] Q. What is the effect of the bruising on the salability of peppers, or on the honeydew melons in this instance?

A. Bruised spots show up causing decay and discoloration. These melons sell on appearance. If they look like they are bruised in any way or decayed, well, you can't sell them. They won't bring the top price. They won't bring any price if they are too far or too badly bruised.

DEPENDANT'S CASE:

[fol. 170] S. D. ROBINSON, called as a witness by the defendant, being duly sworn, testified upon his oath as follows:

Direct examination.

By Mr. Sharpe:

Q. Would you please state your name to the Court and jury?

A. S. D. Robinson.

Q. Where do you live, Mr. Robinson?

A. Palestine, Texas.

Q. How long have you lived in Palestine?

A. Since I was born.

Q. I won't ask you how long that's been. By whom are you employed?

[fol. 171] A. Missouri Pacific Railroad.

Q. How long have you been connected with the Missouri Pacific Railroad Company?

A. Since 1941.

Q. What is your present title and position?

A. Traveling Freight Claims Adjuster.

Q. In that position is it part of your responsibility when a claim is filed to a shipment of perishables to secure the appropriate papers from the various carriers showing the record of movement of the car; that is, starting at the place where it's shipped to the place where it wound up and was sold and a record of protective service; that is, of icing of the car and the vents and plugs and so forth?

A. The records are actually obtained by the investigators in the office and then it's my duty to take them out and handle them after the investigations are completed.

Q. Yes, sir. Now, in this case we have four separate shipments involved that have been described in Counts I, II, III, and IV of the petition; have you compiled the information as to the record of movement and protective service on each one of those cars and have those exhibits [fol. 172] now been marked by the Court Reporter?

A. Yes, sir.

Mr. Sharpe: Your Honor, at this time we will offer in connection with Count I, which involves Car ART 35042, the record of movement from Rio Grande City, Texas, to Chicago, Illinois, and the record of protective service, and a summary of those matters contained on the top sheet.

[fol. 173] Mr. White: We have no objection.

The Court: All right, they will be admitted.

By Mr. Sharpe:

Q. Now, Mr. Robinson, I want to hand you the exhibits concerning Count I, which involves Car ART 35042, a

[fol. 174] shipment from Rio Grande City, Texas, to Chicago, Illinois, of honeydews, and ask you to examine this exhibit while I ask you some questions about it. First of all, when was that— Do you have a notation there of when the car was loaded and when its loading was completed?

A. Yes, sir. The loading commenced at 9:00 a.m. on June 11th; completed at 2:00 p.m. on June 11th.

Q. Now, if you will, Mr. Robinson, speak out a little louder so I can be sure and hear it; the air conditioner is going on here. A little slower; now, when was the loading started on the car?

A. On June 11th at 9:00 a.m.

Q. All right.

A. And completed on June 11th at 2:00 p.m.

Q. When was the car actually released from Rio Grande City?

A. On June 12th at 3:00 p.m.

Q. Now, would you just trace its movement to, destination there from your run sheet?

A. Do you mean by that, the actual movement record?

Q. Yes, sir. Tell where the car went to.

A. The first junction point was Dupo, Illinois, where it arrived on June 15 at 12:15 p.m., where it was delivered [fol. 175] to the Illinois Central Railroad June 15th at 4:20 p.m.

Q. Illinois Central, you say?

A. Yes, sir.

Q. It traveled on the Missouri Pacific from Rio Grande City to Dupo, or did it go on Texas & Pacific for a while?

A. It moved all the way by Missouri Pacific.

Q. Missouri Pacific from Rio Grande City to Dupo. Now, where is Dupo located with reference to St. Louis, Missouri?

A. It's across the river from St. Louis proper.

Q. So, for all practical purposes, unless we make a distinction, when we say "Dupo," we are talking about the area of St. Louis, are we not?

A. That is correct. It's considered a part of the St. Louis Switching District.

Q. All right. After the car was transferred to the Illinois Central Railroad at Dupo on the 15th, where did it go then?

A. It departed East St. Louis at 5:15 p.m. and went to

Chicago, Illinois, where it arrived the following morning at 3:15 a.m.

Q. Now, was there a diversion order on this car, or a reconsignment?

A. Not until after arrival of the car at Chicago.

[fol. 176] Q. All right. Now, when was the diversion order or reconsignment?

A. Let me correct my statement there. There were two diversions filed on it. There was a change of ownership diversion. The first one was filed June 13th.

Q. Is that in the file?

A. Yes. I overlooked that because it was not noted on the run sheet, is the reason I didn't give you that at first. The second reconsignment was on June 17th at 12:05 p.m.

Q. Now, was the car at Chicago, Illinois, at that time, or where was it?

A. Yes, sir, it was on a hold track at Chicago.

Q. 6/17/1958 at what time?

A. 12:05 p.m.

Q. All right. Now, when was the car actually placed for market?

A. The car was actually placed on the hold track on the original arrival on June 16th at 6:20 a.m.

Q. That is June 16th?

A. After the order filed on the 17th, it was then placed to the consignee prior to 7:00 a.m. on June the 18th.

Q. All right. Now, are you familiar with the schedule— [fol. 177] As a matter of fact, on your run sheet, is the schedule for this particular car set out there?

A. Yes, sir, it is.

Q. Considering the reconsignments and diversions that were made, Mr. Robinson, was there any delay in the handling of that car to its destination?

A. No, sir, it was not. The original schedule— Regardless of the diversions, the car was due to be in Chicago for delivery to the C. P. T. Company—which is the Chicago Produce Terminal Company—on June 16th at 3:00 a.m.

Q. All right, sir. Now, in connection with the information that you have there on the right-hand side of the summary sheet, you also have a record of the icings, do you not?

A. Yes, sir.

Q. I am not going to ask you any particular questions about those, Mr. Robinson, because we have another witness here, but I do want to call your attention to the fact that you have a record of the icings on the summary sheet, as well as the movement of this car?

A. Yes, sir.

[fol. 183]

Cross examination.

By Mr. White:

Q. Mr. Robinson, your testimony has been not from the original records but from copies made for the purpose of this trial; is that right?

A. Yes, sir.

[fol. 184] Q. Now, you have stated that these records are copies that have been made for the purpose of this trial?

A. Might I be permitted to clarify my answer to that question just minorly?

Q. Surely.

A. They were copies, but they were not prepared primarily for the purpose of this trial, but were prepared in the course of our investigation of the claim after the claim was filed, not specifically for this trial.

[fol. 185] J. A. FRIEND, called as a witness by the defendant, being duly sworn, testified upon his oath as follows:

Direct examination.

By Mr. Sharpe:

Q. Will you please state your name to the Court and jury?

A. J. A. Friend.

Q. Where do you live, Mr. Friend?

A. St. Louis, Missouri.

Q. About how long have you lived in St. Louis?

A. Since 1911.

Q. What is your present business or occupation, Mr. Friend?

A. I am retired.

Q. Before you retired, what was your business or profession?

A. My last position was with the—I was Superintendent of Refrigerator Service of the American Refrigerator Transit Company.

Q. American Refrigerator Transit Company. Now, will you please tell the Court and jury what that company is [fol. 186] and the nature of its business undertaking?

A. The American Refrigerator Transit Company is a refrigerator-car company owned by Missouri Pacific and Wabash Railroads. Our business is to supply cars to those railroads and certain other railroads to protect their loading of perishable products. We also have charge—had charge, and still do—of protective service on certain lines, such as supplying the ice, ventilation service, heater service, keeping the records thereof, and other allied matters, all having to do with the protection of perishable traffic in transit. During that time, I had other positions. From 1911, to 1915, approximately, I had clerical positions, stenographical positions.

Q. I asked you how long you had lived in St. Louis; you said 1911, Mr. Friend. Is that the year you became associated with the A. R. T. Company?

A. Yes. I started with the A. R. T. Company in 1911.

Q. All right, sir. Now, when did you retire from active service with the A. R. T. Company?

A. May 1, 1958.

Q. You had about forty-seven years' service, then, with the company?

A. Yes, sir. Yes, sir.

[fol. 187] Q. During that period of time—I think you started to tell me this—did you hold various positions with the company?

A. Yes.

Q. And, if so, outline those for us in a general way.

A. From 1911 to the early part of 1915, I was a stenog-

rapher and held various clerical positions. From 1915 to the latter part of 1928, I was Chief Clerk, and later Assistant to the General Manager. It was on October 1, 1928, that I became Superintendent of Refrigerator Service. I was also, for a period of about thirty years, from 1928 to—the time I retired, a member of the National Perishable Freight Committee.

Q. What is that, in a general way?

A. National Perishable Freight Committee?

Q. Yes, sir.

A. It's a national organization that publishes the Perishable Protective Tariff and handles the rules, makes recommendations for the rules and charges on all perishable freight in the United States. It was created during World War I, and Tariff No. 1 became effective February 29, 1920. Tariff No. 18 is now in effect.

Q. Now, you are referring to "tariffs"; will you tell [fol. 188] the jury, if you will, in layman's language, what you mean by a "tariff"?

A. Well, a tariff of any kind is a publication by the railroads outlining the rules and certain regulations and the charges that they must make against the shipper for the transportation of freight over those rails, and those tariffs, of course, must be approved by the I. C. C. which means Interstate Commerce Commission.

Q. Yes, sir. Now, were you a member of that Freight Perishable Committee for a considerable period of time there?

A. Yes. I was a member from October 1928 to May 1, 1958, when I retired. I might add there, if you will allow me, right during the latter part of World War II, and for several years thereafter, there was a committee established for a while; it was a joint committee of the railroads and the U. S. Department of Agriculture, who made a number of tests in transit. I was a member of that committee. And one more: I was Assistant Secretary of the company for ten years before I retired.

Q. A. R. T. Company?

A. A. R. T. Company.

Q. Now, Mr. Friend, in the course of your connection [fol. 189] with the American Refrigerator Transit Com-

pany, have you had occasion to study the subject of refrigeration, especially in railroad cars, and have you become familiar with the matters relating to refrigerator cars, such as icing and the position of vents and the construction of them and so forth?

A. Yes, I have.

Mr. Sharpe: I have an exhibit here that I want to have marked, to show you, Mr. Friend. That is a general exhibit, Mr. Reporter.

(Whereupon the instrument referred to was marked for identification by the Court Reporter as "Defendant's Exhibit A.")

Mr. Sharpe: I don't intend to use it on any specific car; I just want to use it for demonstration purposes when we are talking about the car. We offer "Defendant's Exhibit A."

Mr. White: No objection, Your Honor.

Mr. Sharpe: Thank you.

(Whereupon "Defendant's Exhibit A" was received in evidence. Please refer to INDEX TO EXHIBITS for location of this instrument in this STATEMENT OF FACTS.)

[fol. 190] By Mr. Sharpe:

Q. Now, Mr. Friend, in connection with this case and with these records, they have got a lot of statements in here about bunkers and vents and plugs and a number of other technical terms; I wonder if you could do this: perhaps you could stand up here and maybe I could hold this. Could you come down here and let's just use this to where the jury can see it so you can point out some of the main portions of a refrigerator car, and if you will, come over here by my side. Show us where the bunkers are on a refrigerator car, Mr. Friend.

A. At each end. At the end from the top to the bottom. There is a space which is shut off from the bottom balance of the car by this heading here we call the "bulkhead."

Q. Let's hold it as straight as we can.

A. In other words, this is solid, this piece is solid (indi-

ating), and here's your ice bunker (indicating), and here it shows the ice in place (indicating). It's, as though you were taking off the side of this car here and this side over here (indicating). And these bunkers run from 268 to 280 cubic feet per car, half of that in each end.

Q. Approximately how many pounds of ice will these bunkers hold, Mr. Friend?

[fol. 191] A. Per car, around 10,000 pounds. Some of them as high as eleven.

Q. Would that be roughly 5,500 pounds in each bunker?

A. In each bunker, yes. Here's the hatch on top (indicating).

Q. Let me ask you that question specifically so we can get it in the record. We've got a reference here to "hatches" sometimes and other times "vents" and other times "plugs"; now, will you show us what we mean by those terms and where they are located on the car?

A. They are on top of the car above these ice chambers. There's two on each end. This running board—I might first explain. You all—or most people—understand what is meant by the "running board." This running board, of course, runs from end to end on the roof of the car. And these hatches are on each side of that running board, two at each end (indicating).

Q. Are they adjustable?

A. Yes, they can be raised to allow ventilation. And in refrigeration, of course, they are closed.

Q. We use the terms "vents" and "plugs" sometimes; as a practical matter, are they separate or together?

A. Most of them are together.

[fol. 192] Q. Will you indicate on this diagram where the vents and plugs would be?

A. They would be right up here (indicating).

Q. Two on each end?

A. Yes.

Q. Now, will you just indicate the center door there to the jury?

A. The center door is here, half way from each end of the car. (indicating).

Q. All right. Well, I just wanted to show the jury especially the ice bunkers and the vents and plugs. Now, it

may be that a little later, Mr. Friend, I will ask you some more questions about that.

(Witness resumes the witness chair) I will ask you first if a refrigerator car used for carrying perishable commodities such as honeydews and peppers is designed or so constructed that the temperature would be controlled, and especially to lower the temperature inside the car compared to that with the outside air?

A. That is the whole purpose of a refrigerator car. The car is insulated in the walls to slow down the travel of heat from the outside, just as your refrigerator in your home is insulated. Then these ice chambers at each end [fol. 193] are there for the purpose of adding ice (indicating). Ice makes refrigeration. That is, the melting of the ice is what makes your refrigeration. That is the purpose of the refrigerator car. But, if it were not for the icing to ventilate cars, you wouldn't have all this insulation. Many years ago there were cars without ice bunkers. They were just built for ventilation.

Q. I see. And although it's not involved in this case, in many instances you have shipments, such as onions, that are carried without icing?

A. We have many thousands of cars that move each year without ice, under ventilation. They open these vents so that the air can get in and out.

Q. All right, sir. Now, Mr. Friend, in your experience, have you made tests and do you know approximately how much a refrigerator car of a certain type would be designed to use as far as ice is concerned and where the regular icing stations are along the various carrier routes?

A. Yes. There is a publication by this National Perishable Freight Committee which publishes the icing stations along the route. As to ice, I don't know whether I understood your question there about how much ice they might take—

Q. Well, have you had any experience making tests along [fol. 194] that line?

A. Yes.

Q. Does ice tend to melt with the passage of time, especially where it's in refrigerator cars, where you have honeydews and peppers and other perishable commodities?

A. Yes.

Q. The protective service—and I will use that term to include the icing and the vents and the plugs, Mr. Friend—who dictates or orders or determines what type of service shall be furnished on a refrigerator car on a particular shipment?

A. The shipper.

Q. And are there various kinds of services that he can select that he can direct the railroad to furnish?

A. Yes. The Perishable Tariff has—I wouldn't know just how many, but perhaps a hundred different classes of service, starting with ventilation, which is no ice at all. He may ship with one icing only, initial icing, Rule 240. He may start with two icings, three and four. With standard icing—which is icing at all regular icing stations—he, in addition to that, can specify salt, if he wants to, certain percentage of salt, which is supposed to step up the meltage [fol. 195] and refrigeration. There are a hundred classes of service from which the shipper dictates what he thinks, in his opinion, will best protect his shipment.

Q. All right, sir. Let's take these shipments here one at a time, Mr. Friend, and I will ask you some specific questions about the protective service on them. I will hand you the papers in connection with Count I and I will hand you both the plaintiff's exhibits, with the bill of lading and diversions, and the defendant's exhibits, showing the running record. Now, you have looked at the railroad record in each of these counts before coming here to court, have you not, Mr. Friend?

A. Yes, sir.

Q. And I will ask you, in connection with Count I, which is a shipment of honeydew melons from Rio Grande City, Texas, to destination, to Chicago, what the papers there indicate as to the type of protective service that the shipper ordered?

A. He ordered standard refrigeration to destination.

Q. Now, what does that mean?

A. That means that the car will be reiced to capacity at all regular icing stations.

Q. All right. Now, will you take the summary there

of the icing on this car and, if you will, just read it off [fol. 196] to us. There are not very many items there?

A. Well, the car was initially iced at Rio Grande City on June 12th. It was reiced at Harlingen. Do you want the amounts?

Q. Yes.

A. Reiced at Harlingen at 5:30 a.m.

Q. What was the initial amount, Mr. Friend?

A. Ten thousand pounds.

Q. Now, was that bunker ice?

A. That's bunker capacity, yes.

Q. And then at Harlingen?

A. Harlingen, the next morning at 5:30 a.m., June 13, with 7,500 pounds. The next icing was at Houston at 8:00 p.m. that date with 7,500.

Q. All right, sir.

A. The next was at Lexa, Arkansas, 9:50 p.m. on the 14th, with 6,600 pounds. The next icing was at Dupo, 12:50 p.m. on June 15th with 3,300 pounds. And the next icing at Chicago on June 16th was at 2:05 p.m. with 3,400 pounds.

Q. All right, sir. Is that the complete icing record?

A. That is the complete icing record.

Q. All right. Now, Mr. Friend, based upon your experience and your knowledge of the icing stations, I will ask you if the shipper's instructions were followed in con-[fol. 197] nection with the icing of that car involved in Count I?

A. They were, yes.

Q. Was the amount of ice that was used there in any way above normal or excessive?

A. The icing was above normal for—that is, above most commodities. These honeydew melons were gassed? they are held inside the closed car for sometime after they are loaded. You have fairly hot weather, of course. You had a large amount of outside heat; that is the heat that was in the commodity when it was loaded. And then you have your heat of respiration of the commodity, itself. Any living plant, of course, gives off heat of respiration, just like a human body. So you had a terrific load here to carry; you had an enormous amount of heat to dissipate. It will be, even as you got up to Dupo, which was three days after ini-

tial icing, that that icing became—was reduced materially. For example, your Dupo icing was twenty-five hours, 3,300 pounds. Then you go to Chicago, about twenty-six hours and take 3,400 pounds. That is quite a reduction from what it was down the line here while the car was so hot.

Q. Mr. Friend, I want to be sure we understand each [fol. 198] other. What you are saying is, because of the conditions of this particular commodity and the amount of heat and so forth at origin, that heavy icings were required, are you not?

A. Yes, sir.

Q. Now, under the conditions of all those circumstances, do you consider that the amount of ice was excessive for the purpose that was to be accomplished?

A. No; I would expect this.

Q. It's fairly normal for a shipment of this kind when you start out with a dry car to use more ice for the first few icing stations, is it not?

A. Always.

Q. And for the amount of ice that is used up the way and at destination to be smaller than at the earlier stations?

A. Yes. For example, if you pre-ice a car, as we call it, very often the shipper will order a pre-iced car; that is, it will be pre-iced before loading, and, of course, that will cool the car off and partially cool the commodity off and, normally, it might dissipate five or six thousand pounds of ice before the car is ever waybilled and starts on its journey. In these cases, that wasn't done, so the load had to take its toll on the ice in transit.

[fol. 199] Q. All right, sir. Now, Mr. Friend, in connection with Count I, will you pick out the icing after the car left Rio Grande City that involved the greatest amount of ice, greatest number of pounds?

A. Well, both are even. Harlingen took 7,500 on the 13th; Houston took 7,500 at 8:00 p.m. that day.

Q. All right, sir. Now, what I want to ask you is this: 7500 pounds—ordinarily, does the ice in each bunker melt out about evenly, or is there some variation in them?

A. No; fairly evenly.

Q. Well, would you safely say that within pretty narrow limits when 7500 pounds was put in this car at Harlingen

and Houston the probabilities are that about 3750 pounds was put in each bunker?

A. Yes.

Q. All right, sir. Well, we'll go to Count II. I'll hand you the defendant's exhibits, as well as the plaintiff's exhibits, on Count II, and I will ask you first to tell the Court and the jury what the shipper's instructions were in regard to protective service and icing on Count II?

A. The shipper's instructions on the bill of lading were: "DRY CAR LOADED—STANDARD REFRIGERATION TO DESTINATION."

[fol. 200] Q. That would be just the same as the first car, would it not?

A. Yes. O

Q. Now, Mr. Friend, I omitted asking you one item on Count I. The record that you had there showed that the vents were closed and the plugs in all the way?

A: Yes.

Q. Is that customary on that type of a shipment?

A..To keep them closed?.

Q. Yes.

A. Yes, it's customary. In fact, it's a provision of the tariff, that unless otherwise instructed, all the hatches, as we call them, or the vents and plugs—it's the same thing—will be kept closed when the car is under ice.

[fol. 206] Q. I'll ask you this, Mr. Friend: To what extent does the outside temperature have in connection with the inside temperature of a car and the amount of ice that it uses?

A. Well, the outside temperature manifestly has a bearing on the inside temperature, and that fluctuates according to the differential, difference between the inside and out. I would say normally in anything like warm weather, we would figure that it would take from 1500 pounds to a ton of ice a day, in a twenty-four-hour period, to offset the infiltration through the car walls.

Q. Up as much as around 200 pounds or a little less per hour?

A. No; one hundred. In other words, an empty car closed up and iced would take something like that per day:

[fol. 209]

Cross examination.

By Mr. White:

Q. Mr. Friend, you have testified the icing at Huntington on the second car was higher than normal; that is, it required more ice than normal. Isn't it possible— Now, I'm not asking you to state that it happened, but isn't it possible that one of the vents could have been opened or all of the vents could have been opened during that time?

A. May I have that run, please, sir?

Q. That's on No. 2.

A. This is Count No. 12. Well, they show the vents closed on arrival at Huntington, all the way. In fact, [fol. 210] all the way through. Vents and plugs or hatches were closed all the way through.

Q. That is what your records show?

A. Yes.

Q. Where were these records made?

A. These records are made by each of the original railroads, the original—

Q. Yes?

A. They would be made at the icing stations.

Q. In other words, that is the only place they check the vents and plugs to determine whether they are closed or open?

A. Yes, I would say that is substantially correct. When the car comes in to be iced, they will check that as a part of the icing service.

Q. And it's very easy and possible that those records are sometimes in error, is it not?

A. There can be error anywhere in the world, I suppose, but I have no reason to believe that these are in error.

Q. Well, now, those things do happen, do they not?

A. I would say from time to time. I'm not talking about this, now; I'm talking about all transactions, anywhere, of any kind, manifestly, error occurs.

Q. Well, I want to eliminate all transactions otherwise; [fol. 211] I'm talking about your railroad records as to the position of vents and plugs. It is not unwell, I wouldn't say "unusual," but it's not unheard of for a record to be in error?

A. I would agree that it's not unheard of, but let me say that it's so very rare as to be virtually non-existent.

Q. Well, isn't it a fact the last time that I saw you, it was in this courthouse some five years ago, you were testifying from a similar record and your testimony was that there was no defect in the vent record on that car and the next witness or representative of the Wabash Railroad gave us the record that there was a vent defect, from your record which covered the same time, and covered the entire route, the A. R. T. record showed a clear record?

Mr. Sharpe: If the Court please, we object to retrying some other case at some other time when the record, itself, is not before this jury here, and it would just require— In the first place, it's not material as to any specific instance. That would have to be determined in that lawsuit, whatever it was. I frankly don't remember it right now. I'm sure I'd remember it if it was tried, but we object [fol. 212] to it on the ground of lack of materiality, and in the absence of producing the record that he's talking about. They would be the best evidence of it.

The Court: Sustain the objection.

Mr. White: Beg your pardon?

The Court: Sustain the objection.

Mr. White: I'm just testing the witness's veracity and memory as to these records. I have him on Cross Examination, Your Honor. If he doesn't recall it, why, he can say so.

The Court: All right, I will let him answer to that extent.

Mr. Sharpe: Well, I'd like to reply, Your Honor. If he's asking for records, we insist they would be the best evidence, and we think the Court's ruling was right on it.

The Court: We'll let him answer to the extent if he recalls.

By Mr. White:

Q. Do you recall the occasion, Mr. Friend?

A. I recall the occasion, Mr. White, but I do not recall testifying that the vent record was clear all the way through and that it was subsequently developed that there [fol. 213] was an error, because my recollection of that case was that I was testifying only about the records on the Missouri Pacific Railroad, and you had representatives representing the other railroads who testified for their own account. Therefore, I would have been out of order in testifying for them when they were here. That is my recollection of that case.

Q. All right. Now, you state that you represent the A. R. T. Company, who actually owns these refrigerator cars?

A. Yes.

Q. You have those records in your possession for the transit and for the entire—for the entire transit, do you not?

A. No. Oh, no.

Q. You don't keep the record? You don't have access to the records for the transportation of your car through the entire transportation?

A. We have a record of the movement of the car, the car interchange from one railroad to the other, but we would have nothing on the protective service on the connecting lines.

Q. And you only maintain the protective service record while it's on the line of the Missouri Pacific; is that right?

[fol. 214] A. Well, we have the Missouri Pacific, Denver & Rio Grande, and some other short lines.

Q. When were the cars in this case built? Do you have those records?

A. Built?

Q. Yes.

A. No, I have nothing to show that.

Q. You don't have records as to when each of these cars were constructed, when each were originally built?

A. No.

Q. Do you know whether or not they were equipped with fans?

A. All equipped with fans, yes.

Q. All of these cars were equipped with fans?

A. Yes.

Q. What is your record as to the running of the fans in each case?

A. We do not record records on the operation of the fans because there is no tariff requirement that the operation of the fans be recorded. Our instructions are to operate these cars with fans on in all cases unless otherwise specified by the shipper.

Q. Your instructions from whom?

A. Yes.

[fol. 215] Q. Your instructions from whom?

A. Our own instructions to our forces.

Q. You don't know— You don't have any records as to whether or not the fans were maintained or kept running in any of the instances of these cars?

A. Yes; there are some records. We keep some records along the line, some cases where time will permit. It takes a good deal of time to check these.

Q. You don't have those records available here?

A. No, no.

Q. What is the purpose of the fan?

A. The purpose of the fan is to speed up the travel of air and give somewhat better refrigeration and more uniform distribution of the air through the car.

Q. That will spread the refrigeration faster through the car and will equalize it throughout the car, will it not?

A. Yes, it would. If I can use this (indicating "Defendant's Exhibit A"), if there's no objection?

Q. Not at all.

A. Aside from— Let me say this: I said a while ago you get refrigeration by the meltage of ice. Manifestly, if you speed up the air travel through the ice, make it go through more often, you should get some more and will get some more distribution. Prior to fans, let me say, [fol. 216] it wasn't uncommon for top and bottom tem-

peratures to spread six to eight degrees; sometimes more. With the operation of the fans, you've got a very—you come very close to an even temperature at the top and bottom. Now, looking at this thing ("Defendant's Exhibit A"), prior to fans, your refrigeration travel, your air travel, was just opposite of what it is with fans. Cold air is heavier than warm air. Your warm air would go through these openings in the ice chamber. As it came through, it would come over the ice and out the bottom. The fans operating is just the opposite. You see here, these fans, these are electric fans. This one is dropped down to show how they are located (indicating). This end shows them in place (indicating). The fan operation reverses that; pulls the air up through the ice and up and out over the top of the load and on the top of the load, and what used to be the vulnerable spot or the weaker spot is sometimes now the best spot in the car. That is the big advantage of the fan. They all have fans, all of these cars have fans.

Q. But you don't have the records as to whether the fan was kept on all the time?

A. They are not here.

[fol. 217] Q. Now, in the absence of the fan running, isn't it a fact that the top of the load will be, as you say, warmer or hotter than the bottom of the load?

A. It will be somewhat warmer if it stands any length of time, but let's take a car runs for—substantially for twelve hours, eighteen hours, whatever it may be; it tends to cool, if anything, the top of the load a little better than the bottom. When your car stops, you will go back to what we call "convexion"; you will get the opposite. So it just about equalizes.

Q. So if your fan is not operating, you revert back to your statement a while ago that you sometimes have a spread there of six to eight degrees?

A. Yes.

Q. And if you have— In that instance, the commodity in the top, being in a higher temperature, will have a tendency to either ripen or decay faster than that in the bottom, would it not?

A. If it were that way in length of time. I'd like to observe, however, Mr. White, I have been through all of

these files and, as I recall it, the destination inspection showed very good temperatures, fairly uniform temperatures.

Q. But you don't show the temperatures of the cars back [fol. 218] during the time they were in transit; that is the destination.

A. We have no recording device to show the temperature in transit.

Q. It's very logical, is it not, that if the fan would not be turned on at all in transit and you had one commodity or part of the load in the top of the car or say the top center of the car, that it would receive higher temperatures and be affected greater than that that would be on the bottom of the car?

A. If the fans hadn't operated for any great length of time, there would be that differential, yes, but our instructions are very firm, and I'm—my recollection is that all railroads have that—that the fans will be operated unless the shipper dictates to the contrary, all the time.

Q. How long does it take it— When you do turn the fans on, how long does it take to actually effect an equalization of temperature in the load?

A. That would be difficult to say, unless you knew what your spread was at the start of this operation.

Q. If the spread were, say, ten degrees, it wouldn't take it over, say, ten hours, would it?

A. Oh, longer than that.

Q. How long?

[fol. 219] A. Oh, twenty-four hours, perhaps. I haven't any evidence on that.

Q. That is, if the spread is as much as ten degrees?

A. Yes.

Q. But say if it were five degrees spread, it would take half that long, approximately?

A. Yes. I might say, a change in the circuit of the air is virtually instant. Once you turn those fans on, it's got to come out there.

Q. But none of these cars we have the record as to the fans?

A. I'm not sure.

Q. I think one or two of the destinations do?

A. I think the destination inspection shows the fans on.

Q. The Car No. 1 here shows the fans were on?

A. Yes. Now, let me see.

Q. I believe that is the only one.

A. I think perhaps that is right. It supports my statement that we do operate these fans in ON position unless told to do otherwise. They were put in for that purpose. We are going to use them; we have reason to use them. In other words, we wouldn't have spent about \$500 a car to put them in.

Q. Now, Mr. Friend, you made a remark about the fact [fol. 220] that these cars were not precooled; that is, that the commodity was not cooled before this gassing. Now, you understand that the melons have to be warm when they are gassed, do you not?

A. I understand that is the general practice, yes.

Q. And that is the general practice?

A. Yes.

Q. And that the icing is not put on these honeydew melons until after the gassing in the car has been allowed to clear out?

A. That is right. I'm not quarreling with what they do there; I'm merely pointing out that, since it's necessary to do that, then, of course, this commodity is going to be very warm, very hot.

Q. That is right.

A. Before you close it up and put in ice. And the pull on the ice is going to be terrific in such a car.

Q. And you wouldn't suggest they do it in any other car, would you?

A. Terrific! No, sir.

Mr. White: Pass the witness.

[fol. 221] Redirect examination.

By Mr. Sharpe:

Q. Mr. Friend, do the fans in these refrigerator cars run when the car is standing still?

A. No, sir, they do not.

Mr. Sharpe: We pass the witness.

Mr. White: No questions.

Mr. Sharpe: Thank you, Mr. Friend.

(Witness excused.)

HERBERT HULSE, called as a witness by the defendant, being duly sworn, testified upon his oath as follows:

Direct examination.

By Mr. Sharpe:

Q. Will you please state your name to the Court and jury?

A. Herbert Hulse.

Q. Where do you live, Mr. Hulse?

A. Long Island, New York.

Q. How long have you lived in the State of New York?

A. I have lived in the State of New York about two years.

Q. And what is your business or profession?

A. I am with the Railroad Perishable Inspection Agency. [fol. 222] My title is Special Representative. I work in a supervisory capacity with that company.

Q. How long have you been connected with the Railroad Perishable Inspection Agency?

A. About fourteen years.

Q. Now, Mr. Hulse, will you first tell the jury just what the nature of the business of the R. P. I. A. is, and in order to save repeating so many words, I am going to call it the R. P. I. A.? What is the nature of the business of the R. P. I. A.?

A. We inspect perishable commodities, mostly at destination, and establish the condition of those commodities at the delivery points.

Q. And what is the nature of the business organization of the R. P. I. A.? Who is it organized by and who supports it?

A. It's an organization that was organized by the Eastern carriers, principally, the Pennsylvania, New York Central, and about thirty different carriers in the Northeast part

of the United States, and the purpose of the organization was to make a uniform inspection for all of those carriers.

Q. Uniform inspection of commodities mainly being shipped in to Eastern points, but in some instances, being shipped out, too, I suppose?

[fol. 223] A. We do a limited amount of field work; that is, shipments at origin being loaded, but most of our work is at destination.

Q. All right, sir. Now, is the management and operation of the R. P. I. A. separate and independent of any railroad, or is it subject to the orders of any particular railroad?

A. Well, the management is subject to the orders of our Board of Directors, which is made up of one member from each of the—what we call “member carriers”; that is, carriers in the association.

Q. And the practical operation of the R. P. I. A., in making inspections at these Eastern destination points, how is the management part of that handled? Do the instructions come through the R. P. I. A. in its management, or someone else?

A. The instructions come entirely from the management of the R. P. I. A.

Q. In other words, insofar as the practical operation of the R. P. I. A. is concerned, it's an independent agency?

A. Yes, sir; it is.

Q. Now, Mr. Hulse, will you tell the Court and jury what schools or colleges you attended, what subjects you studied, [fol. 224] relating to horticulture, plant pathology, marketing, and so forth, and what degrees you hold?

A. I had one year at the State Institute of Applied Agriculture in Farmingdale, Long Island, and I had four years of schooling at the College of Agriculture, Cornell University. I have a Bachelor of Science degree from Cornell University. My major at that university was vegetable crops; my minor was agriculture marketing. I took courses in botany, plant physiology, entomology, and pathology.

Q. All right. Now, Mr. Hulse, will you tell us what year you first became—in what year you first became connected with the R. P. I. A.?

A. Between my senior and junior years at the University. I had one summer with the R. P. I. A. That was in 1946.

And in June of 1947, I started again with the R. P. I. A., and I have been with them ever since.

Q. What was the first position that you held with the R. P. I. A.?

A. Junior Inspector.

Q. Now, in that position, what, generally, were your duties?

A. Well, when I first started, I was working with senior inspectors and actually learning the business and how to [fol. 225] make perishable inspections.

Q. Mr. Hulse, it may be that you and I understand some of these matters involved in inspections at these destination points, perhaps some of the jurors do, too, but perhaps some of them haven't observed it. Tell us just a little bit of how one of these inspections works in one of the places at New York City.

A. Well, every inspection that's made, whether private or U. S. D. A., is a sample inspection; that is, a certain number of packages are taken, as a sample. They try to get them from various locations in the load.

Q. First of all, let's start with this premise: In most of those Eastern markets, we have two cars that went to Boston; are you familiar with the inspections at Boston, as well as Pittsburgh, New York, and all those points?

A. Yes.

Q. First of all, at each of those places—and since we've got two shipments going into Boston, we'll use that—it's not unusual to have a lot of railroad cars of shipments each day?

A. It's usual to have a large number each day, yes, sir.

Q. That is, especially during the season of the year [fol. 226] where fruits and vegetables are produced in the various sections of the country—Rio Grande Valley, California, and Florida?

A. We have a large number of cars on hand each year from different points. We hope we do.

Q. Now, when those railroad cars come in,—let's take Boston, since we have two shipments going there—what is the usual procedure as far as the R. P. I. A. is concerned, as far as making an inspection of that car?

A. Well, an R. P. I. A. inspector will go into the car, if the load is accessible—that is, if some of the load has been taken out so he can go into the car—and takes sample packages, opens them and examines the contents; makes a record of what he finds in the contents, and then writes his report from that record.

Q. All right, sir. Now, as a usual proposition, Mr. Hulse, it's very difficult to get into some of these railroad cars and to see anything more than just a very small portion of the load in it?

A. That is very common to only be able to get at what we call a "doorway" inspection. Some of these loads are very high, even—particularly, in recent years, with heavy loads; they are above the height of the door opening, so [fol. 227] your inspection is limited to the doorway.

Q. Now, then, I want to pick back up; I was asking you about your work as a junior inspector with the R. P. I. A. and you said you did that work for about how long?

A. Well, you're rated a junior inspector for two years, and then you're—

Q. Did you, during that period of time, work with senior inspectors in connection with examination of railroad cars and perishable commodities?

A. A good part of that time.

Q. And after your position as Junior Inspector, what position did you hold with the R. P. I. A.?

A. Senior Inspector.

Q. And for how long did you hold that title?

A. Well, I can't recall exactly. Shortly after I was a senior inspector at Washington, D. C., I went to West Virginia as District Inspector out there.

Q. All right. In what places were you stationed as a senior inspector?

A. Washington, D. C.

Q. When were you promoted to your present supervisory position?

A. Well, that occurred about two and-a-half years ago. [fol. 228]. Q. All right. And in that position have you had occasion to travel to the various Eastern markets—

including Boston and other places—in order to exercise your supervisory functions with the R. P. I. A.?

A. Yes, sir, I have been to all the terminals, in the R. P. I. A. terminals.

Q. Mr. Hulse, have you had occasion to make many examinations, yourself, as an inspector of commodities, such as honeydews and peppers?

A. Yes, sir, I have looked at a good many cars of both.

Q. Now, I want to take the papers that we have in evidence here, Mr. Hulse, and give them to you one at a time and especially ask you about some of these conditions that were found to exist at the destination points. Now, I will hand you the exhibits in connection with Count I of this case, which involved a shipment of honeydew melons from Rio Grande City, Texas, to Chicago, Illinois, in Car ART 35042, and I especially call your attention to the exhibit which is marked "Count I—P-5," which is the United States Department of Agriculture Destination Inspection certificate of this car at Chicago, Illinois, and ask you to refer to it there. Now, I have a copy of it here in the [fol. 229] file, Mr. Hulse, and I'll try to identify the place on that report that I am asking you about. Now, at the top of the United States Department of Agriculture inspection report at Chicago on the car involved in the first count, under "Condition of equipment," do you see: "Hatch covers closed, plugs in, ice in bunkers approximately one foot from top. Fan control lever in 'ON' position"? Do you see that?

A. Yes, sir.

Q. Now, skip from that paragraph down to where it says: "Condition of load," and I quote from the report: "Car partly unloaded; each end of car loaded to near doorway, eight layers, four rows, crosswise; vertical strips at corners of crates." Now, Mr. Hulse, you were in the courtroom this morning, I think, when Mr. Baker testified generally as to that method of loading; is that known by any particular name? Is there something to describe that or not?

A. That is known as a "Pierce" load.

Q. How do you spell that word?

A. That is P-i-e-r-c-e.

Q. Would you describe it generally for us?

A. Yes, sir, there are strips of wood, which are between each stack. First, a stack is readied, and then these Pierce strips are put in place against that stack. These are [fol. 230] loaded in four rows; they are tight together in the car with all of the air spaces at the side walls.

Q. At the side walls?

A. Yes, sir.

Q. I wonder if you would take a piece of chalk—and you can erase what's on there if you will—and show us that?

A. I am a very poor artist here. This is looking at the end of the car (indicating). Say you are standing in the center of the car and looking at the end. Now, these crates are loaded like that (indicating).

Q. After you get it drawn, Mr. Hulse, I want you to step aside just a minute and let us see it.

A. And then these are loaded directly over the top of the other and straight up, in straight-up stacks, until you get eight high—well, seven or eight high.

Q. Well, you don't need to draw them all. And the only air spaces, you say, are between the inside of the outer side of the cars and the crates, themselves?

A. Between the rows, yes, sir. See, these rows are tight, one to the other. Now, against this stack face is put a strip, which extends to the height of the load like that (indicating), in that position. And then at each side wall [fol. 231] is a completely different arrangement. It's sort of a triangular piece that goes against this wall and is so spaced that it goes pretty close to—against the crates here (indicating), and it is arranged so that the crates sit into a little corner there, that piece there (indicating). This is solid, of course (indicating). Then, on these Pierce units, is what we call a "little plank"; it's a little metal piece that goes between these rows. It's a thin metal, thinner than this piece of chalk here (indicating). It goes between the crates to keep these spacers from sliding off to the side. And then against this stack face (indicating), the next stack of containers is loaded. And then another.

These units are then positioned against that stack and so forth till you get to the doorway of the car.

Q. All right, thank you, Mr. Hulse. Now, the next notation on the United States Department of Agriculture report on the car involved in Count I is: "Condition of packs: Tight; excelsior in bottom of crates." Now, looking at the notations we have had there so far, is there anything to indicate to you that the load was out of line or out of ordinary in any way?

[fol. 232] A. No, sir, there is nothing in this report to show any sort of thing.

Q. It appears to be a tight through load, does it?

A. Well, the car is partly unloaded. When you say "through, tight load," we have a term that that means. That means that the crates are loaded all the way through the entire body of the car. These loads are what we call "divided" loads.

Q. Yes. Now, I notice there under, "Temperature of product: Stack nearest doorway: Top, forty-six; bottom, forty." What happens to temperatures in a railroad car of this type, Mr. Hulse, when the door is opened, and in that area?

A. Well, when you open the doors of a car, you have a change of air there, depending on how cold the air in the car is and how hot it is outside. Sometimes, that is a very big change, and we expect the commodity temperatures to start rising after that door has been opened, particularly in the top layer, because they have the heat— In other words, as you can see, when you get up high, you've got a lot of air space on the top of that load, so you get your biggest change in the top of the load, and you would expect the temperatures to start rising at the top.

Q. All right. What is the— What have the temperatures [fol. 233] shown on the car there?

A. Well, both of these temperatures are desirable; forty to forty-six is a very good temperature to hold honeydews at. I don't know how long this car's been opened or how much has been removed; the report doesn't show that.

Q. Yes, well, we have that on the record here as to when it arrived and so forth. Let me have the defendant's papers there.

A. Yes, sir.

Q. The record that's in evidence shows that this car was placed in the hold yard at Chicago on the 16th of June at 6:20 a.m. Now, the inspection on your U. S. D. A. report is June 18th at 1:30 p.m. That's more than two and-a-half days, isn't it, after the car arrived?

A. Yes, sir.

Q. All right.

A. I might add there, with the car standing still that long, even if the doors weren't open, you would get a rise in the temperature in the top layer. That is, the cold air would drop.

Q. That is especially true where the fans were not running?

A. Yes.

[fol. 234] Q. Although the reports in this case show that the fans here were on?

A. Yes, but the fans don't work unless the car is moving, because they work from the wheels.

Q. Now, going down further, from the U. S. D. A. report at Chicago on the car involved in Count I, Mr. Hulse, look under "Quality," where it says: "Grade defects average six per cent, mostly scars." Now, will you tell the Court and jury what is meant by "grade defects" in honeydew melons?

A. Well, grade defects are things that affect the melon, like, for example, scars. When they mean "scars," that is a field condition—growth or harvesting defects, that have scarred over. It's things that affect the appearance of the melon.

Q. Now, are you familiar with the fact that the United States Department of Agriculture has set up standards which allow what is called "tolerances" for grade defects?

A. Yes, sir.

Q. And do you know that in the case of U. S. No. 1s, that as much—

Mr. White: Just a minute, Your Honor. Would you ask—Instead of leading your witness there, I suggest that he ask him—

[fol. 235] Mr. Sharpe: Oh, well, we'll just offer it in evidence. Let's mark it, Mr. Reporter.

(Whereupon "Defendant's Exhibit No. B" was marked for identification by the Court Reporter.)

Mr. Sharpe: We offer in evidence "Defendant's Exhibit B," which is the United States Department of Agriculture Standards for Honeydew and Honeyball Melons.

Mr. White: Your Honor, we object to it for the apparent reason counsel intends to use it. He has a witness on the stand he hopes to qualify as an expert on these matters; I would suggest that he ask the witness if he is familiar with the tolerances and not give him the instrument from which he can now read the tolerances. If he is an expert and knows these tolerances; he ought to be able to testify without it.

Mr. Sharpe: That is exactly what I was doing.

The Court: Let's don't argue between counsel. All right, restate your question and then if there is an objection to the question, I'll pass on it.

By Mr. Sharpe:

Q. Mr. Hulse, do you know what the tolerance allowed by [fol. 236] the United States Department of Agriculture standard on honeydew melons is for grade defects?

A. Yes, sir.

Q. What is it?

A. Ten per cent.

Mr. White: I didn't get the answer.

Mr. Sharpe: "Ten per cent."

The Witness: Ten per cent.

By Mr. Sharpe:

Q. And I'll ask you, then, to look at the notation, then, on the United States Department of Agriculture inspection certificate on this car at Chicago involved in Count I, and ask you whether or not the grade defects as found there would be within the tolerance for that melon to grade U. S. 1?

A. Yes. Six per cent would be within tolerance.

Q. Yes. Four per cent less, wouldn't it?

A. Yes.

Q. Now, let's go a little bit further into the sampling process in order to determine these grade defects. Mr. Hulse, in a case like this, about how many of those melons would the inspector usually look at?

A. U. S. D. A. inspector?

Q. Yes.

A. I don't know what they'd look at at Chicago, but [fol. 237] speaking generally of what I've seen them look at at other places, they would probably look at two or three hundred melons, anyway.

Q. Three hundred?

A. That would be quite likely.

Q. And this percentage that's mentioned there, is that so many melons per a certain unit; that is, in terms of a count of melons, or is it percentage in a particular melon?

A. Is that six per cent scars, now, that you are speaking about?

Q. Yes.

A. That would be the overall percentage for everything that they had looked at.

Q. Well, that would be in terms, though, of six melons per one hundred?

A. Six melons per one hundred.

Q. By count?

A. Yes, sir.

Q. In other words, if the inspector looked at a hundred melons, he found six of them that had grade defects?

A. Yes. Or, if he looked at three hundred, then, he found eighteen.

Q. Yes. That is the way they arrive at the percentage?

A. Yes, sir.

[fol. 238] Q. Now, will you pass on down to— Well, first, look down there at "Grade"; do you see that on the U. S. D. A. report on this car involved in Count I?

A. Yes.

Q. It says: "Now fails to grade U. S. No. 1 only account discoloration and decay." Now, let's go back to "Condition"; it says: "Generally hard to firm." Is that a desirable situation for honeydews at a destination market such as Chicago?

A. Yes, that is the range that you would expect.

Q. And the next notation is: "white to cream color"; is that a good color as far as honeydews are concerned?

A. Both of those colors are acceptable colors on the market.

Q. What colors do you try to avoid or are undesirable to be sold on a market at Chicago, Mr. Hulse?

Mr. White: Your Honor, I'd like to take him on voir dire. Counsel hasn't qualified this witness as to his knowledge of honeydew melons.

The Court: All right, you may.

Mr. Sharpe: I thought I had.

By Mr. Sharpe:

Q. Have you had some experience in connection with the [fol. 239] inspection, classification, grading, decay, grade defects, and so forth, concerning honeydew melons, Mr. Hulse?

A. I have personally made a good many inspections of honeydew melons in cars and we follow the same general principles that any inspection service does; that is, we make our counts and derive our percentages from those counts.

Q. And would your knowledge of that subject even relate back to your college education?

A. To some extent, yes, sir.

Q. Now, in connection with the color of melons, what relationship does the color have to maturity of the melon?

Mr. White: Your Honor, I'd like to take the witness on voir dire.

The Court: You may do so.

Mr. Sharpe: Your Honor, why should he?

The Court: I have ruled that he may test his qualifications, Mr. Sharpe, as I gave you permission to do earlier on his witnesses.

Mr. Sharpe: Well, we except to the ruling of the Court. We think it's proper on Cross Examination.

By Mr. White:

Q. Mr. Hulse, how many cars of honeydew melons have you actually personally inspected?

[fol. 240] A. I couldn't give you the exact number of them.

Q. Well, would it be more than ten?

A. Oh, a good many more than ten.

Q. More than a hundred?

A. I would think so, yes, sir.

Q. Where were those inspections?

A. At Washington. I've looked at a few at New York, when I have been out on the piers, and I've worked a good deal on vacation relief work at various stations in the Northeast United States, and during that service I became—

Q. How long has it been since you inspected a carload of honeydew melons?

A. It's been about seven years.

Q. How long?

A. About seven years; that is, taking the inspection all the way through, myself, and made the inspection. I've been in a good many cars of honeydews with other inspectors, not too long ago.

Q. Have you ever grown honeydews?

A. I want to take that back again. I worked vacation relief the past two summers and I've looked at honeydews during that period.

Q. Have you ever grown any honeydew melons?

A. No, sir.

[fol. 241] Q. You state that you studied about honeydew melons in college; or did you? I didn't get your answer clear on that.

A. I studied fruits and vegetables, generally, in school, physiology of plants, and so forth.

Q. What did that study include?

A. Pardon me?

Q. Did it include the diseases of these plants?

A. Not the specific diseases that we are dealing with on honeydews, no, sir.

Q. Have you studied the diseases of these plants?

A. Well, I have learned to identify those diseases and I have read all the material, a good deal of the material, about those diseases and I feel I have a working knowledge of what they are.

Q. From experience.

A. From inspecting, looking at them, knowing how the diseases develop while the cars are on track and that sort of thing.

Q. But you haven't actually studied the diseases or made a study of them in any school or anything of that sort?

A. In school, no, sir.

Q. What you have learned has been just like the other witnesses here; it's been from your experience, then?

[fol. 242] A. Most of my knowledge of them are from destination inspection work, yes, and from literature that is available on the subject.

Q. Do you feel that you are qualified to testify as to what the desirable characteristics of honeydew melons are for salability?

A. I think I do know what they like on the market, yes, sir.

Q. You never sold them?

A. Never sold them.

Q. But you do feel like you've had enough experience to where you can identify the characteristics, such as color and defects and what not, that would affect the salability of the melon?

A. I feel like I know what they like on the market, yes, what moves out the best.

The Court: All right, we'll take a recess for ten or fifteen minutes.

(Whereupon at 3:18 p.m. a recess was taken, after which, at 3:32 p.m., the trial was resumed in the presence of the jury and the following proceedings were had:)

The Court: All right, Mr. Sharpe.

[fol. 243] Direct examination (Continued).

By Mr. Sharpe:

Q. Now, Mr. Hulse, do you still have the United States Department of Agriculture destination inspection before you on the car involved in Count I of this case?

A. Yes, sir.

Q. I think the question I asked you was in regard to the color of the melon, is white or cream color a desirable color?

A. Both of those colors are very acceptable.

Q. What is an undesirable color or colors in honeydews at destination markets?

A. If you have too much green color, why, it's not as desirable as the white or cream color.

Q. Does green coloring in a honeydew melon in a destination market such as Chicago have any significance?

A. In the degree of ripeness, yes, sir.

Q. What is indicated by a melon that has a greenish tinge?

A. Not fully ripe.

Q. Now, the next notation that I want to call your attention to on this destination inspection certificate is this: "In most samples, one to four melons per crate, some none, average approximately fifteen per cent"—that would [fol. 244] be by count, wouldn't it, fifteen out of a hundred?

A. Yes, sir, it would.

Q. —"damaged by light to dark brown discoloration,"—Now, what is being referred to there when they speak of "dark brown discoloration" and what is it as distinguished from decay or bruising, if the distinction can be made?

A. Well, light brown discoloration is actually a surface blemish of the melon. It's quite common to find that condition at destination markets, and we believe it's associated with immaturity. That is, if a melon is harvested a little bit immature during the grading and packing operation, it will get very slight abrasions, and then the surface will darken.

Q. Now, Mr. Hulse, the record of this car—that is, ART 35042—involved in Count I of this case is in evidence and will be before the jury, and it shows that this car traveled at all times with the vents closed and the plugs in on the car and at destination, the fan lever control was in the ON position, under instructions at standard refrigeration; that the car was reiced at every regular icing station, was inspected at Chicago on June 18, 1958, when that condition [fol. 245] of dark brown discoloration was found, fifteen per cent of the samples. Now, in your opinion, is that con-

dition of light to dark brown discoloration related or associated in any way with the railroad transportation of honeydew melons?

A. No, sir, it is not.

Q. What can it be related to, Mr. Halse?

A. Well, as I explained, we believe that it's associated with immature melons. The melons, during the harvesting and packing operation, if they are immature, they have kind of a rough feel to the surface.

Q. Well, the dark brown discoloration, then, could be related to something that happened before the honeydew melons were put on the railroad car; is that your testimony?

A. Yes, sir. A fully mature melon has a good, hard, tough rind to it; an immature melon is very slightly rough.

Q. And the next notation on the U. S. D. A. destination report of this car at Chicago, the one in Count I, is this: "In most samples none, some one or two melons per crate, average approximately three per cent decay, Bacterial Soft Rot, generally in advanced stages." Now, would you please [fol. 246] first tell the Court and jury what is meant, first, by "Bacterial Soft Rot," where it originates and where it can be found?

A. Bacterial Soft Rot is a decay of—it's common decay found in many fruits and vegetables. It's caused by an organism, bacterial organism, and it's of field origin. The bacteria are commonly found on plant debris and that sort of thing, and it develops when the conditions of temperature and moisture are ripe for the development, bacteria-wise. You find it very commonly at destination on a great many fruits and vegetables.

Q. Now, let me ask you, if you assume that a honeydew melon was inoculated or infected by some Bacterial Soft Rot at the time it was packed and put on a railroad car and was carried under the conditions that we have in evidence here in this case on the car in Count I, and arrives at Chicago after being shipped from Rio Grande City, where the temperature at the doorway, the stack nearest the doorway, was forty-six degrees Fahrenheit on the top, and on the bottom forty degrees, would those temperatures—and assuming further that the car had been reiced through the journey, would those temperatures tend to retard, as far

as it could be retarded, the development of Bacterial Soft Rot?

[fol. 247] A. Well, the temperatures we have here would be favorable to retard that decay, because the lower the temperature you have, the more you are going to retard the development of Soft Rot.

Q. But even at forty degrees or forty-six degrees, if you start out with a honeydew melon at Rio Grande City that had some Bacterial Soft Rot in it over a period of six days or so, would the percentage of decay tend to increase?

A. Yes, sir. The decay would become more noticeable during that period. That is, you might have an infection or an inoculation at shipment that just can't be seen, but during the transit period, particularly where you've got a car that, for part of its journey, was very warm, why, that decay can develop and become very noticeable and cause a softening and a sloughing off of tissue.

Q. Now, I want to ask you, Mr. Hulse, in regard to the handling of these honeydew melons at Rio Grande City as is shown by the evidence here. After the melon is harvested, the evidence shows that it's taken into the packing shed and it's processed there, melons are put into a crate and then put into railroad cars and gassed, and the temperatures are not reduced in that car until after the gassing [fol. 248] process is finished, when the car is finished. Now, what is that operation relationship with increasing the ripeness of a honeydew melon?

A. Well, it does increase the ripeness of a melon.

Q. And if a honeydew melon at that stage, when it's put into a railroad car, has some decay in it, of Bacterial Soft Rot decay, what does that process of keeping it at high temperatures there for several hours tend to do to the decay?

A. Well, that would favor the development of the decay. It would become very noticeable.

Q. Now, we have no inspection of the honeydew melons in Counts I, II, or III in this case, and we can't say from any written report how much decay was in those melons, but I'll ask you, Mr. Hulse, if you can express an opinion from your knowledge and experience and educational background as to where the decay shown in the honeydew mel-

ons involved in Count I originated and the cause of it? First of all, will you answer the question, can you express an opinion?

A. Yes, sir, I can.

Q. What is your opinion about that matter?

A. It's my opinion that the decay originated at shipping point, either during the harvesting or the packing operation, [fol. 249] and that the decay developed so that it was noticeable at destination.

Q. Now, sir, I want to ask you in connection with the U. S. D. A. inspection certificate of this car involved in Count I of the petition if there is any finding made concerning bruising of these melons in that report?

A. No, sir, there is no report of any bruising.

Q. None shown in that particular report?

A. No, sir.

Q. And then we come back again to the notation of "Grade" on this report; it says: "Now fails to grade U. S. No. 1"—that is the top grade for honeydews, isn't it?

A. Yes, sir.

Q. —"only account discoloration and decay." Do you see that?

A. Yes, sir.

Q. And you have just expressed your opinion as to the cause of both the discoloration and decay?

A. Yes, sir.

Q. Can you relate either one of them, Mr. Hulse, either the discoloration or decay, to railroad transportation under the conditions which have been shown to exist surrounding this car?

[fol. 250] A. No, sir.

Q. Now, does the R. P. I. A. make inspections at Chicago?

A. No, we do not.

[fol. 264] Q. In other words, both of these reports agree that the honeydew melons in this car involved in Count III were fairly good quality?

[fol. 265] A. Yes, sir.

Q. And continuing on, in the second paragraph of the R. P. I. A. report, it shows: "Thirty to forty per cent

"slightly rough areas, corky or netted, remainder smooth." Now, will you please tell the Court and jury what is meant by the "corky or netted" areas, Mr. Hulse?

A. Yes, sir. That is a growth condition. Some melons grow that way. They have a raised area on the surface which is sometimes referred to as "netting." It's a growth condition. Those thirty to forty per cent rough areas would be a quality factor.

Q. Well, does the fact that a honeydew melon shows corky or netted areas after it gets up to Boston and after being transported six or seven days on the railroad have anything to do with railroad transportation of that melon?

A. No. If you had thirty to forty per cent corky or netted areas at destination, you would have had the same at origin. In other words, it isn't something that is going to happen—

Q. In other words, you would end up with what you started with?

A. Yes.

Q. Can you express an opinion, then, that corky or [fol. 266] netted areas amount to something that existed prior to the transportation of honeydew melons by the railroad?

A. Yes, sir. Definitely.

Q. Now, sir, the other notation there by the "corky and netted" matters says: "slightly rough areas." Does that mean just what it says?

A. Yes. I think the "corky or netted" is explaining the rough areas. What they are trying to get on honeydews is a smooth rind all the way around, and corky or netted areas just detract a little from that.

Q. Now, the next notation in the R. P. I. A. report on the car involved in Count III is: "Three per cent light brown discolored areas"; would your testimony in regard to Count III be the same as it was to Count II?

A. Yes, sir, exactly.

Q. Does the existence of light brown discolored areas in a honeydew melon have anything to do with railroad transportation of it?

A. No, sir.

Q. The next notation in the R. P. I. A. report is: "Seven per cent soft ripe or soft areas." Now, will you tell the jury and the Court what causes a honeydew melon to [fol. 267] be soft ripe or have soft areas?

A. Well, that is just an advance in the ripeness of the melon. Honeydew melons, as they ripen, will go from hard to firm and eventually to a condition of soft, and when they say "soft areas," they mean that the blossom end of a honeydew will be the first to soften. That is, a honeydew doesn't soften the— The entire rind doesn't soften the same degree at the same time; it starts at the blossom end, and then eventually the whole melon becomes soft. It's simply an advance in the ripening process.

Q. Is that an inherent quality of honeydew melons?

A. Yes, sir.

Q. They ultimately are perishable, aren't they?

A. They will ripen to that extent.

Q. If given enough time, they will ripen and then decay?

A. Yes, sir.

Q. The next notation on the R. P. I. A. report is: "Six per cent soft with watery seed cavities, range zero to fifty"—no; "watery seed cavities." We'll stop right there. "Watery seed cavities"—what does that mean?

A. Well, this six per cent of the melons were soft. And, in addition, the seed cavity, in the center of the melon was watery; that is, the seeds were loose and the cavity [fol. 268] was watery.

Q. And does that condition have anything to do with railroad transportation of a honeydew melon, Mr. Hulse?

A. No, sir, it does not.

Q. Where would you say it started or developed?

A. Well, again, it's associated with ripeness. If you have melons that get that ripe, why, those seed cavities, seeds, become loose and watery.

Q. All right. Now, the next notation on the R. P. I. A. report is: "Six per cent normal contact pack bruising and range zero to twelve per cent, average one to two per cent soft rot decay in advanced stages." I will ask you about the bruising first.

A. I want to say, you skipped a line there.

Q. Oh, I'm sorry.

A. It's "Zero to fifty per cent full ripe, mostly fifteen to twenty per cent."

Q. I did. I'm sorry. "Range, zero to fifty per cent full ripe, mostly fifteen to twenty per cent, remainder firm to mostly hard ripe." Now, what's the significance of that "zero to fifty per cent full ripe," Mr. Hulse?

A. Well, it means you have a wide range in ripeness. But, more important than that, that amount of full ripe, [fol. 269] together with the amount of soft and the soft with watery seed cavities, put it together and you have a very ripe car of honeydew melons.

Q. Very ripe?

A. Too ripe, yes, sir.

Q. Now, in connection with the notation on "Six per cent normal contact pack bruising," would your testimony be the same on this count as it was on Count II?

A. Yes, sir, it would be.

Q. Can you associate normal contact pack bruising with the railroad transportation of a honeydew melon?

A. No, sir, it's not.

Q. Then the next notation in the R. P. I. A. report is: "Zero to twelve per cent, average one to two per cent soft rot decay in advanced stages." Now, you have testified a while ago in connection with the other count about Bacterial Soft Rot; is this expression that is used here any different?

A. No, sir. When he says "soft rot decay," that would be Bacterial Soft Rot.

Q. Is there any relationship, considering the record in this case, of a car that traveled under standard refrigeration, vents closed; plugs in, in accordance with the shipper's instructions—is there anything in that transportation condition that would cause you to believe that the soft rot decay was caused by the railroad transportation?

A. No, sir.

Q. Where did that soft rot decay originate, Mr. Hulse?

A. Well, again that is of field origin or packing-house origin. Melons are inoculated at shipping point.

Q. Now, the inspection report that I have just gone over there was of the inspection dated June 25, 1958; now, there

was a follow-up inspection on June 29, 1958, some three days later. Do you see that?

A. Yes, sir.

Q. And without just going into detail on each one of the conditions there, in some respects the shipment was worse, was it not, after the passage of four days?

A. Well, it's worse. I think the only thing that's really worse about it is the advance in decay. You have three per cent Bacterial Soft Rot decay, but the other factors stayed pretty much the same. I think that is pretty interesting to note, because honeydew melons store pretty well if you get the temperature down right; that is, if you get the temperature low enough, they hold up pretty good. And I think that this indicates—it does to me, anyway—that this [fol. 274] advance in ripeness and the decay, if you assume that the melons were good at shipping point, occurred early in the transportation period. After it gets at destination, it shows a certain amount of ripeness, and then—the 25th to the 29th—four days later that ripeness advanced very little.

[fol. 277] Q. Have you studied the general opportunities for inoculation and infection of organisms in peppers?

A. Well, the organism must have a point of entry to affect the produce. That is true of practically all fruits and vegetables.

[fol. 282] Cross examination.

By Mr. White:

Q. Mr. Hulse, do I understand your testimony, now, that nothing the railroad did or did not do in any one of these cars could have possibly contributed to any of the decay or defects at destination?

A. Yes, sir, that is right.

Q. In other words, your testimony is that nothing the railroad did or that they were supposed to do or that they did not do that they were supposed to do—

A. I didn't see anything that caused the conditions found.

Q. Beg your pardon?

A. I didn't see anything in the records that caused the conditions.

Q. That's not my question; my question is: Is it your testimony that there is nothing the railroad could have [fol. 283] done or failed to do that would have contributed to this decay or condition?

A. That they could have done or failed to do? Well, I don't know what else they could have done to protect the shipment. I looked at the records and saw nothing in there that would cause the conditions.

Q. Now, you have made your opinions here as to what caused the decays and conditions at destination without knowing what the temperature was at any point from the time that commodity left the point of origin until it got to destination; isn't that correct?

A. Well, we don't know what the temperatures are in transit, during the transit period, commodity temperature. No one has that information. That's no way of taking those temperatures.

Q. And you don't know whether or not the fans were kept on in these cars at any time, whether they were turned off or on?

A. Well, from looking at the records, I believe the fans were on in all of those cars. It indicates to me that they were.

Q. But there is no record to show whether they were on or off?

A. No, sir.

Q. Now, you have made your answers to Mr. Sharpe's question on the first car, which had to do with the car of melons at Chicago on the 18th, which the inspection was made without knowing what the temperature of that car was upon its arrival at Chicago on the 16th?

A. Yes, but I looked at the destination temperatures on the 18th and that tells you something.

Q. Now, do you know that the car was iced on the 16th in Chicago after it arrived in Chicago?

A. Wasn't that part of the record?

Q. It is, but did you take that into consideration?

A. When I looked at the record I didn't see any defect in the service, that I could see.

Q. But could you make an intelligent answer, render an intelligent answer, not knowing what the temperature of the car was when it arrived in Chicago?

A. I believe so, yes, sir, from the commodity temperatures that we had when the car was inspected on the 18th.

Q. Well, wouldn't it be very possible that the icing on the 16th and keeping of the car from the 16th over to the 18th would maintain—would bring the temperatures down and maintain that same percentage of decay over that period of time?

[fol. 285] A. Could I see the record on the Chicago car you are talking about? Now, you want me— Give me that question again. I want to look at these temperatures.

Q. To begin with, you do not know what the temperature of the car was when it arrived in Chicago?

A. Not until the time the inspection was made, that is right.

Q. Isn't it true that that car was iced on the 16th?

A. Yes, sir, I believe it was; let me check. I believe we've got two of our wrong records together here. That's Count IV of peppers.

Mr. Sharpe: Oh, yes, I'm sorry.

A. Yes, sir, the record shows it was iced on the 16th.

Q. On the 16th?

A. Yes, sir.

Q. Now, you state that on the 18th the temperature in the car was a good temperature for the keeping of melons?

A. Yes, sir, it was.

Q. And if that temperature had been brought about by the icing on the 16th and brought down to that temperature, then, it would have maintained the percentage of decay that had been in there, would it not?

[fol. 286] A. Well, I might not follow you exactly, but if the commodity temperatures on the 16th on arrival had been high,— You'll have to give me that question again, because I lost you a little bit there.

Q. Well, maybe I haven't made myself clear, but isn't it— You have stated, now, that the temperatures in the car at

the time the inspection was made were ideal temperatures for the keeping of melons?

A. Yes, sir, they are good temperatures for keeping melons.

Q. And you stated that you don't know what the temperatures, though, were on the 16th when the car arrived?

A. At no time until the car was opened and the inspection was made.

Q. You don't know whether that decay was in the car on the 16th or not?

A. No, sir, but I suspect that it was.

Q. You suspect that it was?

A. Yes, sir, I do.

Q. Because that temperature that was in the car now would maintain that?

A. Would hold it, maintain it, pretty well, yes. You may have a slight increase at those temperatures, but it would pretty well hold it and retard the development.

[fol. 287] Q. Now, would you examine the destination inspection on that car and show us what the percentage of normal pack bruising is?

A. Well, they haven't mentioned the pack bruising in this car.

Q. Well, that is a condition factor, is it not?

A. Bruising is a condition factor, yes, sir.

Q. And the government inspector would have discovered it if it had shown bruising, would he not?

A. No, sir. There's a great deal of that pack bruising that is not discovered either by the U. S. D. A. or R. P. I. A. or private inspectors. We see it in a great many cars and it's often not discovered.

Q. You mean that the United States Department of Agriculture inspector would not discover a factor that affects the condition of the car?

A. These small normal contact pack bruising, bruises, those small areas, no, they don't always discover those.

Q. What are the tolerances on bruising by the United States Department of Agriculture, according to their standards?

A. I couldn't tell you how big the spot has to be before they discover it, but I know that we get that condition and

[fol. 288] they don't mention it. Just like many other inspectors don't. That's normal, and they see it and it's very common.

Q. Is it your testimony, now, that you are not familiar now with the United States Department of Agriculture tolerances on U. S. 1 honeydews as to bruising?

A. I am generally familiar with those tolerances, yes, sir.

Q. What are the tolerances?

A. There's a ten per cent allowance for bruising or any other defect.

Q. Now, what's the total? In other words, what's the total defects?

A. Ten per cent.

Q. In other words, if there's six per cent bruising and four per cent other defects, that would reach the maximum tolerance?

A. That would be the extent of the allowable, but then, within all of those grades, you must understand that they don't discover every defect that affects the melon; that is, that it has to be damaged by that defect before it's scorable at all.

Q. Well, now, is it your testimony that this bruising does not damage the melon?

A. It's not damaged. Those small contact bruises don't [fol. 289] hurt them; no.

Q. You don't consider that they affect the salability of them?

A. No, sir, I don't.

Q. Would you examine that destination inspection prepared by the U. S. D. A. and see what it has to say as to the maturity of the melons?

A. They show the melons being generally hard to firm, white to creamy color. These are maturity factors, ripeness factors.

Q. Beg pardon?

A. They show them to be generally hard to firm, white to cream color.

Q. Read the quality part of the inspection.

A. "Mature, clean and well formed. Grade defects average six per cent, mostly scars."

Q. And it states that the melons are mature, does it not?

A. Yes, sir.

Q. Now, you have testified as to Bacterial Soft Rot and stated that that is an infection that takes place in the field or on the shed?

A. That is the origin of it, yes, sir.

Q. Isn't Bacterial Soft Rot ordinarily considered a transit disease?

[fol. 290] A. It's considered a transit disease from the standpoint that it develops in transit to the extent where it's notable, yes, sir.

Q. Now, isn't it also a fact—

A. I want to tell you the reason for that. Bacterial Soft Rot, if it's advanced to the standpoint—it's culled out at the packing shed. It's culled out if you can see it at origin.

Q. And isn't it a further fact that Bacterial Soft Rot is a bacteria that is in the ground and in the air everywhere?

A. It's in the plant debris, that type of thing.

Q. But isn't it actually a bacteria that is in the ground everywhere that any commodity is grown?

A. It's pretty well distributed. It's in the soil and it's in the wet areas.

Q. In other words, it can be acquired almost anywhere at any time?

A. I'm not going to go that far and say that. We find sometimes that it's a known fact that during rainy seasons that the bacterial organisms disseminated a great deal more; that is, it's spread around in the field a great deal more. In dry seasons, it isn't. That is a pretty general statement that it's floating around in the air all time.

[fol. 291] Q. Don't the records show in this case there was no rain and it was a dry season?

A. I don't think so.

Q. Well, it's in the records there introduced by the defendant.

Mr. Sharpe: The rain?

Mr. White: Yes.

Mr. Sharpe: I sure didn't notice it.

A. It says "heavy rains during this melon season."

By Mr. White:

Q. It says "no heavy rain," if you'll read it correctly.

A. Number Eight: "Heavy rains during this season."

Mr. Sharpe: Number Eight, and it says "heavy rains • during the season." Let's look at it.

A. You care to see that?

Mr. White: I think you've got that introduced.

Mr. Sharpe: I'd forgotten it.

By Mr. White:

Q. All right, Mr. Hulse, isn't it a fact, now, that Bacterial Soft Rot, even a commodity can be inoculated with it, and if it's submitted to the proper temperatures, keeping temperatures, that it will not advance?

A. Yes, sir, it will be retarded if the temperatures were [fol. 292] kept down.

Q. And isn't that the purpose of standard refrigeration?

A. That is one of the principal purposes, yes, sir, to keep those temperatures down.

Q. But, as you say, Bacterial Soft Rot is considered a transit disease?

A. Well, I want to repeat again, it's considered a transit disease because it becomes noticeable and discoverable during that transit period. It's a field-origin disease.

Q. Now, you have stated that, in your opinion, the decay started in each of these cars while it was in the field?

A. Yes, sir, during the packing and handling or shipping point.

Q. How do you reach that conclusion? You didn't actually see them?

A. No, sir, I didn't see them.

Q. Well, how do you reach that conclusion?

A. Well, from my knowledge of this disease.

Q. Well, by your knowledge, now, what you actually mean is that the bacteria could have come from the field or the shipping point?

A. Yes, sir.

Q. Now, isn't it a fact that any commodity grown—to [fol. 293] matatoes, cabbage, lettuce, carrots, anything of that

sort—is exposed to the Bacterial Soft Rot, by the mere fact that it's in the ground?

A. Bacterial Soft Rot affects all of those commodities that you have mentioned.

Q. And all of them will be subjected to it in the growing area?

A. If they have got inoculated at shipping point and the conditions are ripe for shipping, yes.

Q. Now, they can be inoculated, as you call it, and if they are kept properly with the proper temperatures in transit, it will not advance; is that not correct?

A. If you get the temperatures down low enough, early enough, you can retard the development of decay, yes, sir.

Q. How do you account for the difference in decay in the various cars here in this shipment in this suit?

A. Now, you want me to compare peppers with honeydews, take the whole ball of wax?

Q. Just talking about honeydew melons?

A. Just talking about honeydew melons. Well, I think it's— For one thing, they received different handling at shipping point. I'd like to examine all those records before I give you some of the things that might happen. [fol. 294] I'd like to see the transportation records there (records handed to the witness by counsel). Well, for example, you take Car ART 33450, finished the loading on the 31st and they released the car on the 1st; that is, it was loaded and shipped right away. That car went into Boston and showed no decay. I believe you have another one. I'll have to check the record a little closer—where you held it three or four days at shipping point, and showed some decay at destination. There is a difference in handling right there. There could be other differences; they could come from different fields; they could be held on the sheds, or took a longer time to pack them, longer time to gas them. I don't believe it's been brought out how many times they have gassed, or how long they have been held at hot temperatures at origin. There are so many different variables there that you have to take all those into consideration.

Q. Those variables differ as to the transportation of the commodity, also; it's not possible that the fans could be

off or vents could be off at sometime where the record doesn't show it?

A. The destination inspection indicates to me that the fans were on.

[fol. 295] Q. Because of the temperatures at destination?

A. Yes, sir.

Q. But you cannot say whether or not they were on all the time or what the temperatures were anytime in transit?

A. I don't believe anybody can say. There's no record kept of the fans being on or off, but I'd like to say this, that if the fans are on at destination, why, that certainly indicates that they were probably on all the way during the transit period. There would be no reason to turn them on and off during transit.

Q. The only record we have of the fans would be on the No. 1 car?

A. Well, I haven't looked at that portion of the record.

[fol. 303] Cross examination of Herbert Hulse (Continued).

By Mr. White:

Q. Mr. Hulse, you have stated that the organization for which you work is the Railroad Perishable Inspection Agency?

A. Yes.

Q. And that that is an agency of the railroads?

A. Yes, sir, it is.

Q. And the railroads provide the funds with which you are paid; is that not correct?

A. Yes, sir, that is correct.

Q. Now, how much experience or training do your inspectors have before they start inspecting?

A. They work with senior inspectors for a period of time until the senior inspectors or the supervisors feel they are qualified to go on their own, make inspections of their own.

Q. You feel that they are trained and qualified men before they start inspecting on their own, then?

A. Yes, sir.

Q. Now, I believe you also testified that it is not customary for the government inspectors, when they inspect—

[fol. 304] Incidentally, in that connection, are you familiar with the qualifications and training of the United States Department of Agriculture inspectors?

A. Not like I am our own people. I believe that they have certain minimum educational requirements. I don't know what they are. And then they go through a training period, too.

Q. Do you consider them as qualified inspectors?

A. Grade and condition inspectors, yes, sir.

Q. Now, you are talking about grade and condition, are you talking about quality and condition?

A. I am talking about an inspector that is qualified to make grade and condition inspections. They have some at Pittsburgh that are not grade and condition inspectors, but most of the U. S. D. A. inspectors, at points other than Pittsburgh, are qualified inspectors.

Q. Now, would you explain to the jury generally what the difference is between quality and condition factors?

A. Well, quality factors are factors that—such things as field defects, like scars and this netting that we have talked about, and that type of thing, that affect the quality of the melon. Condition factors are such things that might add [fol. 305] vance and cause breakdown, and that sort of thing.

Q. Well, it is generally true that quality factors do not change?

A. That is generally true, yes.

Q. In other words, a quality factor is the same at destination as it was at origin?

A. Yes, that is right.

Q. And condition factors do change?

A. Yes.

Q. Now, I believe you testified that it's not customary for the government inspectors to score bruising?

A. The government inspectors don't score the type of bruising that we have involved in these two counts of honeydews.

Q. I believe you have just refreshed yourself on the tolerances on honeydew melons as specified in the government specifications; as to tolerances on honeydew melons?

A. I just refreshed myself on the wording of how they handled the subject of bruising.

Q. What did you find there?

A. Well, I find that they score bruising when the melons are damaged by bruising. Now, on the last page of that, publication, they show that melons that show pressure [fol. 306] marks in packs shall not be considered damage by bruising. I think you could read that and say it better than I could, but they do score this damage by pressure as bruising.

Q. But it does state, "'Damage' means any injury or defect which *seriously* affects the appearance"—

A. —"materially affects the appearance"—it is cored.

Q. —"or the edible; or shipping quality"?

A. Yes, sir.

Q. Now, what, again, are the tolerance factors that you have with honeydew melons?

A. Well, for U. S. No. 1, it is ten per cent tolerance for all defects, of which not more than one per cent is decay.

Q. And anything that has more than one per cent, then, is thrown out of the—

A. Any lot that has an overall percentage above one per cent would be thrown out, yes.

Q. Now, how about No. 2 as to the tolerance on decay?

A. Tolerance on decay is the same in lower grades.

Q. So, if it has more than one per cent decay, it is out of grade for U. S. No. 2, is it not?

A. I'd like to see that grade just a moment.

Q. I think you have already stated now that you are familiar with these in detail?

[fol. 307] A. Yes, sir, but you are talking about a No. 2 honeydew melon. I don't believe that they have a No. 2 grade. Yes, they do; I'm sorry. U. S. Commercial and then No. 2. Well, the tolerance is the same for decay; it is one per cent.

Q. Now, you did testify yesterday in answer to Mr. Sharpe's question that you were familiar with these tolerances?

A. Generally familiar with the tolerances.

Q. Now, you state that you are just generally?

A. I stated yesterday that I am just generally familiar with them. I don't know every detail of the facets of those grades, but I am generally familiar with them.

Q. What is maturity? Where does it come in? Is it a quality factor or a condition factor?

A. Maturity is a condition factor.

Q. You say it is a condition factor?

A. In some types of produce, yes, sir.

Q. In honeydew melons?

A. Well, you say "maturity"—you're not speaking about ripeness?

Q. I'm talking about maturity. Isn't that the term used in this (indicating U. S. D. A. Standards, marked "Defendant's Exhibit B")?

[fol. 308] A. Well, maturity is where the melons come to fully mature. That would be a quality factor, but, then, the ripeness—which is sometimes referred to as "advance in maturity"—that is a condition factor.

Q. But maturity is a quality factor, is it not?

A. Yes.

Q. As a matter of fact, it's shown on this government inspection as a quality factor, is it not?

A. Yes, sir, it is.

Q. That is the government inspection in Count I. Now, it is also shown as a— Your R. P. I. A. inspections don't classify or don't separate quality and condition, do they?

A. Yes, sir, we generally do.

Q. Well, there you have the Railroad inspection there on Count II, do you not?

A. Yes, sir.

Q. Now, is—

A. Well, generally, when we are writing our reports, we write the quality factors first and condition as the last portion of it.

Q. Now, what did you show there as to quality, as to maturity of those melons?

A. We show them as mature.

Q. As a matter of fact, every inspection that we have [fol. 309] in these three cars, both Railroad, National Perishable, and government, shows these melons to be mature, do they not?

A. Yes, sir.

Q. Did you not testify yesterday that it was your belief that these brown, discolored areas were the result of the melons not being mature?

A. We believe that that is a factor in it, yes, sir.

Q. And yet your inspectors on each of these showed these to be matured melons?

A. Yes, that is true, but you've got to bear in mind that when they score this seven per cent light-brown discolored areas, they would take those melons out of their general description. That is, those are melons that's scored. They base their judgment on everything that is left, the remainder of the produce, and I think the government inspectors do the same thing.

Q. Is it your testimony now that they only score the good melons? I mean, that they only classify them?

A. They score these as light-brown discolored areas, but overall, the melons are generally mature, but, then, they show the specific percentage as being shown in this condition.

Q. Isn't it a fact that if they were going to show that [fol. 310] a certain percentage of them were not mature, they would specify there on the report that they were not mature?

A. Well, I have looked at a great many government certificates and I have never seen this scoring of immature melons. They practically all show them as mature.

Q. The reason for that is that they don't ship them until they are mature; isn't that correct?

A. They try not to ship them immature, but they get some immature ones in there.

Q. Is it your testimony that the government inspection there in Count I, that the government inspector, when he specified their quality, as to the whole car, that he was only saying that the melons that arrived in good condition were mature?

A. No; it's my testimony that overall, he thought the melons were mature, but he still showed seven per cent with this brown discoloration.

Q. And he showed that where, in which portion of the inspection?

A. "Condition."

Q. Condition factors do change, but quality factors do not change; is that right?

A. That is right.

[fol. 311] Q. What percentage of defects do you find in that government inspection, total percentage of defects?

A. As grade defects, average six per cent.

Q. Those are grade defects?

A. Grade defects, average six per cent.

Q. And, now, how about condition defects?

A. It has average of fifteen per cent damage by this light to dark brown discoloration, and he has an average of three per cent decay.

Q. The decay, alone, throws it out of grade for U. S. No. 1?

A. The decay, alone, yes, sir.

Q. And the discoloration would also affect it?

A. Either one would throw it out of U. S. No. 1 grade, yes, sir.

Q. Now, you have stated that you are familiar with these shipments of melons and that you are familiar with the markets generally and particularly these markets in Boston, and you have seen the market reports that we have referred to from time to time; I think you have one there, do you not?

A. Yes, sir.

[fol. 318] Q. Well, let's get back to my question, now. My question is, what if the temperature is allowed to go up in the car while it's in transit, what would be the effect of the melons?

A. Well, if you had an increase in the temperature, you would have an advance in ripeness.

Q. And what effect would it have on decay, for instance?

A. The same would be true, that if you had high temperatures, you would have the conditions—decay could much more readily develop.

[fol. 319] Q. Now, are you familiar with these fans that are used on these cars?

A. Generally, yes, sir.

Q. They are electrically operated, are they not?

A. Some of them are; some are mechanically operated.

Q. I think the illustration that we have here by Mr. Friend, those are electrically operated?

A. That was a P. F. E. car. Most of the P. F. E. cars have electrically operated fans.

Q. Well, to refresh your memory again, they are A. R. T. cars.

A. Well, you said the diagram. The diagram, I believe, was a P. F. E. car.

Q. That's not the one that Mr. Friend used, then.

A. He used that as an illustration. That was a P. F. E. car. That is in evidence. You can look at it.

Q. How do they work? How do these fans work?

A. Well, the fans are located at the top of the—

Q. I mean, mechanically? What makes them go?

A. Well, they have a wheel— Mechanically operated fans have a wheel that drops down on the wheel of the car when the fan is in ON position, and that turns the fan under the floor racks, or even a few cars, they have a cam that goes up to the top of the bunker wall and it's just a mechanical [fol. 320] operation that turns the fans. An electrical fan, why the wheel generates power, electrical power, which turns the fans. I am not much of an engineer, but it's an electrical proposition.

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Redirect examination.

By Mr. Sharpe:

Q. Mr. Hulse, I want to go back a moment to the questions that Mr. White asked you about the scoring of bruising, and I want to hand you the defendant's Exhibit B, which is the United States Department of Agriculture standards for honeydew and honeyball type melons. Now, will you first refer there to the subject of bruising, wherever you find it in there?

A. Well, I'll start with No. 1 "U. S. No. 1 shall consist of honeydew or honeyball type melons which are mature, firm, well formed, free from decay, and from damage."

Q. Is there a definition of "bruising" associated with damage there?

A. Yes, it says they must be free from damage caused by several other things mentioned, and one of them is "bruising." "Must be free from damage by bruising."

[fol. 321] Q. "Damage by bruising"?

A. Yes, sir.

Q. In other words, it doesn't say it should be free from bruising?

A. No, sir; free from damage by bruising.

Q. All right. Now, there is another place there—I think on the second page—which expands on that a little bit. Will you find that?

A. Yes, sir. It defines "damage," and it says: "'Damage' means any injury or defect which materially affects the appearance, or the edible, or shipping quality." And then it goes on to say: "The following blemishes shall not be considered as damage: (1) Slight bruising which is caused by the light pressure of the weight of other melons."

Q. That should not be considered damage, according to the U. S. D. A. standards?

A. No, sir, and they don't consider it.

Q. I think you testified yesterday that is something you do expect?

A. You do expect it.

Q. And it sort of gets down to what the individual inspector, looking at these melons, considers to be damage, doesn't it?

[fol. 322] A. Yes, sir.

Q. In some instances, there can be bruising and he won't score it, and others where he will score it, where he thinks there is damage from it?

A. If he feels that it affects the appearance of it, he will score it; otherwise, he will not.

Q. So you can have honeydew melons without it showing up on a report because it's not considered damage by the inspector?

A. Yes, sir.

[fol. 326] Q. All right. And in either of these cases here, any one of them, was an arbitration inspection requested either at Boston or Chicago?

A. No, sir, there was not. I'd like to mention a couple of things about honeydew melons in particular. That is, if

you have damage in the crate, it's not hidden damage; you can see without opening the crate. You can see every melon in that crate and it's a very easy thing for the consignee or an unloader or anyone, if he sees bruising, to set that crate aside.

[fol. 328] B. G. SLAY, called as a witness by the defendant, being duly sworn, testified upon his oath as follows:

Direct examination.

By Mr. Sharpe:

Q. Will you please state your name to the Court and jury?

A. B. G. Slay.

Q. Where do you live, Mr. Slay?

A. Harlingen, Texas.

Q. How long have you lived in Harlingen?

A. Fourteen years.

Q. What is your business or profession, Mr. Slay?

A. District Inspector of the Western Wing & Inspection Bureau.

Q. How long have you been connected with the Western Wing & Inspection Bureau?

A. Twenty-six years, in this particular time, this hitch.

Q. What is your title or position with Western, Mr. Slay?

A. District Inspector.

Q. And I will ask you to tell the Court and jury generally the nature of the business of the Western Wing & Inspection Bureau.

[fol. 329] A. Western Wing & Inspection Bureau is a freight-inspection bureau that is maintained by and for the railroads west of the Mississippi River.

Q. In the course of your business do you have occasion to examine fruits and vegetables and other commodities loaded in railroad-cars for the purpose of determining their quality and condition?

A. Yes, sir.

Q. How many years have you been doing that, Mr. Slay?

A. About twenty.

Q. And in the course of your association with Western Wing & Inspection Bureau, have you made a study of field conditions and growing conditions of fruits and vegetables in the Rio Grande Valley?

A. Yes, sir.

Q. And have you, yourself, made hundreds of inspections in the Rio Grande Valley of honeydew melons and peppers and other commodities grown here?

A. I wouldn't say they would run in the hundreds. Of course, I don't know how many, but destination, in the destination markets and in the Rio Grande Valley, I would say they would run into the hundreds; probably thousands.

Q. All right, sir. Now, I will ask you, in connection with the subject of honeydew melons, in particular, Mr. Slay, [fol. 330] we have three shipments involved in this case of honeydew melons from Rio Grande City, Texas, in June 1958. One shipment went to Chicago, and two shipments went to Boston, Massachusetts. Have you examined— Have I submitted to you the destination inspection reports in regard to these honeydew melons?

A. Yes, sir.

Q. The R. P. I. A. and the N. P. I. S.?

A. Yes, sir.

Q. And you are familiar with what they show?

A. Yes, sir.

Q. Now, I want to first ask you, Mr. Slay, about the maturity— Well, first, tell us how honeydew melons in the Rio Grande Valley are harvested and packed and what the ideal condition is, as far as maturity and ripeness are concerned, to be shipped?

A. They are harvested in bulk, brought in from the field in bulk, in a truck that has one side of the bed that is on hinges, which can be raised up. As it drives up to the shed, it's on an incline, with that side on the low side of the truck, it's unhinged and lifted up, and the melons pour out, then, onto a platform that also sits at an angle and probably half as wide as this courtroom, and they roll [fol. 331] down to the low side of this platform or this dump place there, and they all go onto a conveyor belt that takes them on into the shed and up over a system of rollers where each melon is turned over and over, so that the graders will have an opportunity to see any defect that it has and

grade it out. From there, then, after they grade it, they go down another belt into the bins where the packers are selecting the melons for packing. Now, you want to go further in that?

Q. Yes, well, we have gone through the rest of it. They are packed and then loaded on the railroad cars?

A. That is right. Then, after they are packed, the lids are applied to the cover. If it's a cover such as these containers here had—fiberboard, of course wouldn't have it, but then, they are picked up, as was explained by Mr. Baker, and carried into the cars with a clamp truck and loaded, then, one at a time, by the loader. He takes them off the stack as they are brought in and places them in position until the car is completely loaded and then it's braced out.

Q. All right. Mr. Slay, I want to ask you, first, before I get over to the question of maturity and ripeness, if at several stages that you have mentioned there,—harvest-[fol. 332] ing, the loading in the truck, the unloading, the processing, the packing and the placing of the crates into the railroad car—there is an opportunity that the melons might become bruised?

A. Yes, there is. In fact, several opportunities. It depends. There are different harvesting— Well, we'll confine our discussion to Elmore & Stahl's.

Q. Have you observed their operation over a period of years?

A. I have. The harvester goes in the field and harvests the fruit in what we call a "harvesting bag." Then the truck has a board that drags along behind. He walks up it. It has cross pieces on it and he puts them out in the truck. They are hauled into the shed in bulk. This truck would be, maybe thirty, thirty-six inches deep and six feet wide or maybe twelve or fourteen, sixteen feet long. I have never measured one of them. They are brought in there. Then there's a possibility, if a melon is fully matured at the time of harvest, of getting some bruising in that melon there. Then when they dump them out on the platform that goes down the conveyor that carries them into the shed, there's a possibility of bruising there. Then when the cover [fol. 333] is applied, there's another possibility. It's all along the way, but it's a commercial practice that is carried on all over the country, the same as is done here; you still have bruising.

Q. Is it difficult, Mr. Slay, at that early stage to determine the effects of bruising?

A. Yes, unless it was very severely bruised. A minor bruise would not show up on a hard melon,—which a honeydew melon is—with exception of the blossom end. When it's mature, the blossom end is soft, and it would necessitate cutting the melon to examine the tissue under the rind to determine if it was bruised, unless it was severely bruised.

Q. But, if a melon was lightly or moderately bruised by dropping it, that is something that could show up five or six or seven days later after the melon had been packed and after it had been carried in a railroad car, isn't it?

A. Well, bruising develops into a formation of liquid in the cells underneath the rind or the peel where the bruising is incurred. Now, the only time it would show up, then, would be to cut and examine the cells or the tissue. Now, after it becomes ripe, then, it is definitely and very pronounced and will show through the rind, such as honeydews. [fol. 334] It will show through, then, after they have become ripe, fully ripe.

Q. Now, let's get over to the question of maturity of honeydew melons when they are harvested, Mr. Slay. In what stage are they usually desirably harvested?

A. Well, when the melon is fully matured, it takes on a characteristic white-creamish color. That is, it's creamy, predominately white—predominately by white. At that stage of the game, the rind must be smooth as glass. When it's immature, when it's first formed on the vine, it has a ribby effect on the rind. The stem end stands out at a point, comes out to a point like. As it matures, this ribbiness disappears from the rind of the melon. The stem end formation comes out smooth, and the rind, then, will adopt a whitish-cream color.

Q. Now, what happens if— Well, first of all, let me ask you, will a honeydew melon still on the vine mature slowly or rapidly?

A. That depends on the condition of which it is— Say Rio Grande City conditions, it is a slow maturing melon; I think one of the slowest that we have. It does not mature and come out and pronounce itself mature such as cantaloupes will by netting. The only thing you can tell about is

[fol. 335] by the change of color and the rind formation becoming very smooth, just as smooth as glass.

Q. All right. Now, were you in the courtroom the other day, Mr. Slay, when Mr. Fillpot testified?

A. No, sir.

Q. Well, we'll go into the gassing problem, then. Are you familiar with the practice of applying ethylene gas to honeydew melons in railroad cars in the Rio Grande City area; as a matter of fact, at the Elmore & Stahl packing shed?

A. Yes, sir.

Q. What is the purpose of applying the gas to honeydew melons, Mr. Slay?

A. The gas hastens the ripening process. It advances it by removing the chlorophyll and increasing the rate of respiration at the time it's in there. In other words, you come out with a uniform ripening; that is something about plants that is not known why. For instance, a cluster of tomatoes that all bloom at the same time; there will be ten days to two weeks' variation at the time the tomatoes on it gets ripe. A bunch of bananas, all of them ripen the same time, yet half of them will be two weeks later in ripening. The benefit of honeydew melons is that you can get a uniform ripening at the time they are delivered to [fol. 336] the market.

Q. Now, what happens in this gassing process to the color, Mr. Slay?

A. It absorbs and removes the chlorophyll by increasing the rate of respiration.

Q. And what relationship does that have to the green which might be in a honeydew melon?

A. If the melon isn't fully matured, it will not remove it at all. The gas has no effect on an immature melon.

Q. You say if it is immature?

A. If it is immature. But if it is mature, it will develop the cream color.

Q. Now, is the sugar content of a honeydew melon an important factor?

A. Yes, it is very important.

Q. If an immature melon is subjected to this gassing process— Well, in any melon, is the sugar content changed by the gassing process?

A. Not at all. It only brings out the flavor which would make you think, maybe, that it had a lot of sugar, but it does not increase the sugar at all. If you have a melon that is showing seven per cent sugar and run it through the gas, you will have seven when the gassing period is over.

[fol. 337] Q. All right, sir. Now, Mr. Slay, it is in evidence here that the melons in this case—and generally, for that matter—were gassed in a railroad car which had not been iced; what, generally, is the temperature of the inside of a railroad car which hasn't been iced? What is the relationship to the outside temperature?

A. You mean a loaded railroad car?

Q. An unloaded one, first.

A. An empty one?

Q. Yes, sir.

A. If the doors are open, in all probability, you will have the same—and the vents open—you would have the same temperature in the inside as outside.

Q. Is it unusual for the temperature at Rio Grande City in the month of June to be over a hundred?

A. Well, it runs from ninety-five to a hundred and five, the maximum.

Q. And the evidence here shows that after the honeydew melons are processed and packed and placed in the railroad car, that it is closed up with the gas hose at the center of the car and for some period of time, depending on the judgment of the man who's putting the gas in there, it's applied; and then, the doors are opened, the car is aired out [fol. 338] and the man who applies the gas looks at the melons to see if, in his opinion, the color is all right, and he can only look at the ones right in the center of the car at a time, because it's fully loaded. Now, Mr. Slay, is there a possibility in that gassing process of using too much or too little or using too much time or too little time?

A. No, sir. Tests that have been conducted by the Science Department of Agriculture develop that you give it so much and it takes so much. They have found that in an air-tight container forty parts per million was as effective as 1,000 parts per million;—it can only do so much—that any additional gassing had no effect on it at all. You are either going to get it the first time or you are not going to get it.

Q. All right. Then, suppose there is not enough gas applied for a sufficiently long time; what would be the effect there?

A. Not enough gas?

Q. Yes, sir.

A. Well, from what they brought out, that it takes forty parts per million, that's a very little bit, when two feet in a refrigerator car.

Q. Well, let's just ask you about the time element, [fol. 339] then. Suppose the gas were not applied for a sufficient length of time; will that affect the maturity of those melons?

A. No. The recommended time would be from twelve to eighteen hours, is what they found is best.

Q. That is for the gas to be applied?

A. Yes, keep them under gas. They are gassed and closed up from twelve to eighteen hours.

Q. All right. Now, at the end of that period, when the car is aired out and the man looks at them to determine whether the color suits him or not or looks at a few samples, what is the importance of that car being iced after that time?

A. To lower the temperature. This particular commodity is different from any of the others, in that it will not—its respiration rate will not increase, it will not start giving off heat when it's harvested like other commodities. The only way you can do it is with ethylene gas. When you take the gas from it, it begins to drop back down. What should be done when it's gassed is to get the gas out of there and then ice the car. They usually blow it out, which is the common practice all over the country, and then place the car under refrigeration to get the temperature down low enough to [fol. 340] prevent the development of your decays.

Q. All right, sir.

A. But, if we were to gas the car and—for eighteen hours—and if the color didn't suit him before, it's not going to suit him after eighteen hours, because it doesn't work that rapidly.

Q. Now, in one or two instances, Mr. Slay, we have destination inspections of these cantaloupes offered in evidence by the plaintiff here, which show that at destination—take

the car that's involved in Count II—show a pale whitish-green color in the honeydews. What does that indicate to you?

A. Immaturity.

Q. And that is some six or seven days after the car was shipped from Rio Grande City. The fact, you say, that there is some greenish color left in it—and in this case, it would be at Boston, after it had made the journey from Rio Grande City—would indicate to you that at the time the melons were loaded and gassed, that they were immature?

A. It does, because they should be whitish cream color to more white when they are harvested. That means that it is mature. A honeydew melon is not like a tomato, that when you pull it off of the vine, you can take it and put it [fol. 341] in storage and ripen it. Unless you gas it, like Mr. Baker said, if you don't gas them, you can hold them out there for a month, if they don't rot, with temperatures that will be favorable toward developing decays, but it will not ripen on its own, because it does not throw off any ethylene at all, like other commodities do.

Q. But the situation changes when the melons are gassed, does it not?

A. When the melons are gassed and they are mature, the color will come out.

Q. Now, the destination inspection report on this case in Count III has a notation—this is the inspection of the N. P. I. S., offered in evidence by the plaintiff—: "Most melons yellow, balance pale whitish green color." What do those colors indicate to you, Mr. Slay?

A. The "yellow" refers to yellow as cream, I suppose. It would indicate matured melons. The "whitish green" would be those that were not fully matured at the time of harvest.

Q. Do you know the difference between best and top quality melons, Mr. Slay? Is there any difference?

A. No, sir.

.

[fol. 347]

By Mr. Sharpe:

Q. In one of these cars, Mr. Slay,—I think it's Count I. Let me look at it to be sure. Yes. —the United States Department of Agriculture destination inspection at Chicago on the car involved in Count I shows damage by light to dark brown discoloration of the honeydews, some of which is sunken, occurring over one-eighth to one-half of the [fol. 348] "surface." Are you in a position to express an opinion as to the cause of that discoloration, Mr. Slay?

A. I don't know, unless it is immaturity. When these melons are immature, they are like every other fruit or vegetable: the epidermis or the outer skin is very tender and you touch them and they scurf up or break, and after a period of time in storage or any place else, that tissue dies and turns brown. Now, the description that he's giving there, I don't know whether that's it or not. That's the only thing that I have ever found, based on tests we have run at shipping point on it.

Mr. Sharpe: We pass the witness.

The Court: Let's take about a ten-minute recess.

(Whereupon at 10:10 a.m. a recess was taken, after which, at 10:25 a.m., the trial was resumed in the presence of the jury and the following proceedings were had:)

Mr. Sharpe: Your Honor, I have one or two short questions I want to ask Mr. Slay before I pass him.

By Mr. Sharpe:

Q. Mr. Slay, you have testified that you are associated with the Western Wing & Inspection Bureau and I will [fol. 349] ask you if the Western Wing & Inspection Bureau makes inspections at Chicago, Illinois, for the carriers west of the Mississippi River?

A. We do. That is our general office location.

Q. Are you familiar with the practice procedure and have you been there many times?

A. Yes, sir.

Q. In connection with the car which is involved in Count I of this case—I'll hand them to you, the plaintiff's exhibits

on Count I in the case—you will notice that there is a United States Department of Agriculture inspection of that car in Chicago, which was made some two days after it arrived there; what is necessary to be done insofar as the Western Wing & Inspection Bureau at Chicago in order to get an inspection of a car of this type that was originally billed— What does the bill of lading show there?

A. Originally billed to St. Louis. You mean the destination?

Q. Yes. —and was re-consigned to Chicago for La Mantia Bros. Arrigo Company, and then the National Tea Company. Now, under those conditions, what would be necessary to get a Western Wing & Inspection Bureau [fol. 350] inspection of that car?

A. The National Tea Company and several other companies all over the country, we have an arrangement that when they find a condition in a shipment of perishables, they call us and we go out and make the inspection. In other words, we make them only on a call basis. When they find something that they attribute to the transportation handling and they call us and we go out, then, and make the inspection. We do not make inspections for grade, which this U. S. D. A. inspection here was made for; we are only concerned with the condition of the commodity, as it affects its value, or something that could be attributed to the handling in transit by the carriers.

Q. The papers in this case, either offered by the plaintiff or the defendant, do not show any request made for a W. W. I. B. inspection, Mr. Slay; can you think of any other reason why it wasn't made?

A. Well, that would be the only reason, under circumstances such as that. We wouldn't know the circumstances over there, because the National Tea is out quite a distance from where we are.

Mr. Sharpe: All right, we pass the witness.

[fol. 351]

Cross examination.

By Mr. White:

Q. The organization for which you work is an agency of the railroads?

A. The Western Railroads, yes, sir.

Q. The Western Railroads?

A. Yes, sir.

Q. Just as A. R. T., for which Mr. Friend works, is an agency of the railroad?

A. Yes, sir.

Q. And the agency for which Mr. Hulze works is an agency of the railroad?

A. That is correct.

Q. The Railroad Perishable Inspection Agency is the Eastern counterpart to the company for which you work?

A. Yes, I think they go north of the Mason-Dixon Line, and then across to the northeast. I don't know the outline of their territory.

Q. You are thoroughly familiar with their operation, are you not?

A. Nothing, other than in conversation with their men and reading their reports.

Q. You are thoroughly familiar with their reports?

[fol. 352] A. I think so, yes, sir.

Q. And are you familiar with their efficiency or whether or not their men are sufficiently trained?

A. Well, I'll say this, that all of them that I have met are very well qualified, Mr. White.

Q. Now, you say you have had an opportunity to examine these inspection reports made by the R. P. I. A.?

A. Four or five days ago, yes, sir.

Q. Let me show them to you; there are three here—Cars II, III, and IV. Now I wish you would examine the inspection of the car in Count No. II of honeydew melons. That inspector showed those melons to be mature, did he not?

A. Yes, I would say that he did; other than those that he took exceptions to. When we report—I think the R. P. I. A. has the same policy that we and the U. S. D. A.

has. If I go into a car and I can say good quality and color and maybe report ten per cent decay, I am not saying that the ten per cent decay is good quality; I'm talking about that that is not involved in the exceptions I took to the load.

Q. Now, let me understand you. Are you saying, then, that the part that you score as ten per cent decay, you don't consider good quality?

A. No, you wouldn't do that. You are only taking about [fol. 353] the remainder of the lading that you didn't take exceptions to.

Q. And it's your testimony that when you say ten per cent decay, for instance, that that ten per cent is not of good quality?

A. Sure, I would say it wasn't good quality. I may say—Here's what I said, was this: that in my general terms, the general description of the entire load may be "good quality." Now, then, I may say, though, follow it up with ten per cent decay. Well, I am talking about ninety per cent that is not involved in the decay; you don't class it. You are talking about—When you are describing the load, you've got to describe the balance of the load that you are not taking exception to.

Q. Now, you agree that quality factors do not change, do you not?

A. Yes, sir.

Q. And if the melon was of good quality at origin, it's good quality at destination?

A. Condition factors could throw it out, because if it gets soft ripe, then that is a condition that it would be overmature and we refer to it as "soft ripe," and that would be a condition factor. "Mature" means that it is mature [fol. 354] and in a marketable condition. But, now, then, if it's soft ripe, then, you wouldn't say that it was good quality, any more than you would if it was decayed, because a decayed melon or fruit and a soft ripe one are both worthless, you might say.

Q. And isn't it a fact that you have testified previously that condition had nothing to do with quality?

A. Oh, I don't think I testified in your words that way, but the condition and quality are two different factors. The quality are the factors that do not change. And the condition is the changing factor in it, such as soft ripe and decay, freezing damage, and so forth. Now, your quality factors deal with color, shape and formation.

Q. But haven't you testified, upon being asked this direct question, that sometimes an inspector will score a car as being poor quality because of condition?

A. I have heard and I have seen such reports as that, but it would be in error.

Q. And you state that that is incorrect and the R. P. I. A. does not do it as a general practice?

A. No, I don't say they don't do it; I say that I wouldn't do it, and we don't. Now, we may have a man that would slip up on it, but that is not our instructions, because we [fol. 355] are not concerned with that portion of the load that is in a deteriorated condition when we are trying to describe the balance of it and its general appearance. The reason for that is very simple: at destination where we have damage on a shipment, our inspector is establishing a basis of settling the damage. Now, if he went into a shipment and said it was good quality and condition, then, that shipment would be worth—I mean good quality—but that it was in an off condition of deteriorated condition, he is saying, then, that that shipment would be worth whatever the good-quality market was if it didn't have the condition. But, if he went in there and says, "good quality"—how did you word it? You said that I had said it before, but I don't remember ever saying it. You said, "good quality except for condition"?

Q. No; "poor quality because of condition."

A. "Poor quality because of condition" would be erroneous.

Q. All right. What do they show on that Car No. 2, in Count No. II, as to the color of the melons?

A. "Seven per cent light-brown discolored areas, remainder good color. Light cream. Hard ripe. Clean. Mature. Twelve to fifteen per cent small, corky areas, [fol. 356] remainder smooth. Four per cent normal contact pack bruising. No decay."

Q. Now, check this one on No. 3. What does the inspector say there as to maturity?

A. "Good color. Mostly full. Clean. Mature."

Q. That is good. Now, he stated it was good color and mature, did he not?

A. Yes, sir.

Q. Now, Mr. Sharpe has inferred on several occasions here—

A. He took quite a few exceptions to this, though. Go ahead; I'm sorry.

Q. They have been gone into. Mr. Sharpe has inferred on several questions to you and to Mr. Hulse that possibly these inspections are not representative because they don't check enough samples; is that your understanding of the R. P. I. A.'s inspection, that they are not representative of the car?

A. I don't know how many samples they take, Mr. White.

Q. Well, you are familiar with them and their manner of operation of business, are you not?

A. I know the procedure, but as to what the operation is, I know nothing. I have never been on the market with any of them, no.

Q. And you don't know— In your own mind, are you [fol. 357] satisfied that the R. P. I. A. inspector's findings are representative—

A. I think that—

Q. —of the car?

A. I think that he has satisfied himself that what he has seen represents the shipment, just like the U. S. D. A. and the other. At destination, some U. S. D. A. inspector may not look at but four or five crates, but he satisfies himself that when he takes these various portions from the load and they are running uniformly, the deterioration, the condition or the quality, then, he satisfies himself that that is representative of the load. I don't think that you could limit an inspector because your inspector should know what he's doing; he's got to look at ten, fifteen, or twenty-five, but where you have a varied percentage in your exceptions to a shipment, such as from zero to forty, then, you may come up with anything afterwards. So it

would be hard to establish an average under such circumstances.

Q. Now, Mr. Slay, you testified that you are familiar with the harvesting process of the honeydew melons in the Rio Grande City area; how do they actually determine maturity at the time of harvesting?

A. I don't know. I don't know how they determine it, [fol. 358] because there is quite a few immature melons, being shipped from Texas.

Q. You don't know how they actually determine that maturity?

A. No, because they bring too many green-colored melons into the sheds, all shippers do, for them to say that they are really picking mature melons. So, in view of that, I don't know how—I couldn't say how they do determine what it is, because they have entirely too many immature melons.

Q. But you testified you were thoroughly familiar with this harvesting procedure?

A. That is correct, but I didn't say about selecting in that harvesting procedure. You could go out and pull up the vines, themselves; that would be in the harvesting process.

Q. Isn't it true that the way they do determine the maturity is that they actually test the melons for sugar content before they are harvested?

A. I don't know, if they do. We ran some tests and the tests varied all the way from six point four to eleven point eight (6.4 to 11.8). So there's quite a varied selection there, don't you think? A good melon, California shippers have told me, I'll admit, I think there's less known about a honey- [fol. 359] dew melon by everybody than any other commodity we have. California shippers tell me they want twelve to fourteen per cent sugar.

Q. I think you probably intend to restrict that, that you know less about honeydew melons—

A: No, I'm not talking about me; I'm talking about myself and everyone that I have talked to.

Q. You have stated you are familiar with this gassing procedure; have you ever gassed a car?

A. No; I have observed it.

Q. You have observed it?

A. Yes.

Q. How many times were you on the sheds and in the fields there in Rio Grande City in June of '58?

A. Oh, Mr. White, I don't know, but I am there two or three times a week every year. I don't know how many times in '58; about every other day, and sometimes, every day.

Q. Is it your suggestion that they should handle them differently than the way they do?

A. No. I think, as I testified, that is a universal practice. They do the same thing in California, where they are noted for shipping melons. But, I would add to that, that if I were shipping melons, I don't think I would dump them [fol. 360] out that way; I think I would handle them a little more carefully.

Q. Now, is it your testimony now that this bruising at destination is caused by the shipper?

A. No, I don't think I said that. I said it could be.

Q. Well, now, there's been a great deal of testimony from Mr. Sharpe of you—and he attempted to bring it out by other witnesses—that the shippers bruise these or could bruise these commodities—

Mr. Sharpe: We object to the form of the question as argumentative.

Q. —in the handling process.

Mr. White: Your Honor, I am just trying—

The Court: All right, go ahead.

Mr. White: I am just trying to understand Mr. Slay's testimony.

Mr. Sharpe: We object to counsel arguing with the witness and having a bunch of dependent clauses and phrases prior to his real question, Your Honor.

The Court: If the witness can answer the question, I'll let him.

A. I think my testimony was that a fully matured melon dropped any distance on a hard surface—now, even though they claim there's cushioning, it's usually an old, hard car-

[fol. 361] pet—you couldn't detect it until it got ripe, without cutting it. I'm talking about ripe, now, at destination, it would show through the rind. As to where it got it, you couldn't say it was done here. There is a possibility of it being done at shipping point. I didn't say that it was or that it wasn't; I said you couldn't detect it until it got ripe, without cutting it.

[fol. 364] Thursday, March 30, 1961, 11:30 A.M.

(In the Court's Chambers)

DEFENDANT'S OBJECTIONS CONCERNING JURY NOTE

Mr. Sharpe: I believe the record should show that at approximately 11:15 a.m. on this morning, which is the 30th of March, 1961, after the jury had started deliberating at about 9:00 a.m., the following question was sent in by the bailiff,—

The Court: You need not read that. The question will be kept and preserved.

Mr. Sharpe: I beg your pardon?

The Court: I say, the question will be preserved.

Mr. Sharpe: It's brief, Judge; I'd like to make the whole Bill.—as follows: Addressed to "Judge Phillips."

"Ref.:"—(R-e-f)—"Count I—Special Issue 5.

"If we answer 'no,'—('no' in quotations)—"do we find that it *was*"—('was' underlined)—"due to failure of carrier? What does 'no'—(in quotations)—"mean? Foreman"—(without any name).

And then, the Court then proposed to give the following answer to that question:

[fol. 365] "You are instructed that in regard to Count I, Special Issue No. 5, the burden of proof is on the carrier to prove that the worsened condition, if any, was not due to its negligence in part. If the carrier has proved by a preponderance of the evidence that the worsened condition, if any, was not, in part, due to its negligence, you will answer, 'It was not due to the failure of the carrier.' If the carrier has not so proved by a preponderance of the

evidence, you will answer, 'No.'—(in quotes). Signed "Hawthorne Phillips, Judge."

The defendant objects to the giving of the proposed instruction by the Court, for the following reasons:

I. Additional explanatory instruction in answer to said question is not required. The issue as now submitted and the proposed form of answer is correct in every respect and does not require explanation in order to enable the jury to understand the same.

II. The proposed instruction amounts to a general charge and affects not only Special Issue No. 5 of Count I, [fol. 366] but affects and will affect Special Issue No. 5 in connection with Counts II, III, and IV, as well, which are submitted in the same form, with only the difference as to the car in connection with the other three shipments.

III. The instruction as to the burden of proof is already placed in the issue as submitted and the additional instruction by the Court in regard to the burden of proof being on the carrier in connection with said Special Issue No. 5 of Count I constitutes an undue emphasis and leads the jury to believe that the defendant in this case has a stronger burden than it actually has.

IV. The giving of such written instruction to the jury at this time deprives the defendant of the valuable right of argument in connection with same. The record will show that this case was argued to the jury yesterday afternoon,—that is, on March 29, 1961—at which time the Court nor counsel had the instruction contained in the Charge or before them so that such matter could be argued to the jury, and the same cannot now be argued to the jury. In that [fol. 367] connection, counsel for defendant's position would have been different and considerably more would have been said about the issue if the written instruction now prepared to be given had been included in the Court's Charge.

V. When the issue—Special Issue No. 5 on Count I—was submitted to counsel for both parties for objection,

no objections were made, and in particular, there was no objection made by counsel for the plaintiff, and, as a result, there is a waiver of the objection that plaintiff could have made to its form and the changing of it at this time comes too late.

For all of those reasons, the defendant respectfully excepts to the ruling of the Court that the proposed written instruction shall be given.

Respectfully submitted,

Missouri Pacific Railroad Co., By: _____,
Attorney for Defendant.


[fol. 368] Reporter's Certificate to foregoing transcript
(omitted in printing).

[fol. 369a] [File endorsement omitted]

[fol. 370]

IN THE 107TH JUDICIAL DISTRICT COURT OF
CAMERON COUNTY, TEXAS

PLAINTIFF'S EXHIBITS COUNT I, P-1

(See opposite) 

County **I**

JUL 10 1940

80166-1

(Uniform Domestic Straight Bill of Lading, adopted by Carrier, an Official, Southern, Western and Illinois Classification Territories, March 14, 1932, as amended August 1, 1935, and June 15, 1941.) 1st Sheet



UNIFORM STRAIGHT BILL OF LADING

ORIGINAL—
NOT NEGOTIABLE

Shipper's No. _____

Agent's No. _____

MISSOURI PACIFIC RAILROAD CO.

RECEIVED, subject to the classification and tariffs in effect on the date of the issue of this Bill of Lading.

At **RIO GRANDE CITY, TEXAS** **JUNE 22 1940** From **ELMORE & STAHL**

The property described herein, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

(Mail or street address of consignee—For purposes of notification only.)

Consigned to **ELMORE & STAHL**Destination **ST. LOUIS**State of **MISSOURI**

County of _____

Route **R. P.**

Delivering Carrier _____

Car Initial **A R T**Car No. **37042**

No. Pkg.	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	Weight (Subject to Correction)	Class or Rate	Check Col.	Subject to Section 7 of conditions. If this shipment is to be delivered to the consignee without recourse on the consignee, the consignee shall sign the following statement: The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.
600	CRTS. (FL175) H. D. NELSONS @ 46	29440			PR (Signature of Consignor.) If charges are to be prepaid, write or stamp here, "To be Prepaid." Received \$ _____ to apply in prepayment of the charges on the property described hereon. Agent or Carrier. Per _____ (The signature here acknowledges only the amount prepaid.) Charges Advanced:
	S L C & W				
	DRY CAR LOADED				
	STANDARD REFRIGERATION TO DESTINATION				

If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding _____

ELMORE & STAHL

Shipper.

Per **Paul Rougier**

Agent.

Permanent postoffice address of shipper **PHAR, TEXAS**

370

LON. P. LUBAR PRINTING CO., ST. LOUIS, MO.

[fol. 371]

CONTRACT TERMS AND CONDITIONS

Sec. 1. (a) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided.

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for natural shrinkage. The carrier's liability shall be that of warehouseman, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of delivery of the property to the party entitled to receive it, has been made. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton, or from riots or strikes.

(c) In case of quarantine the property may be discharged at risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations or authorities, or for the carrier's dispatch at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when property is so discharged, or property may be returned by carrier at owner's expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to property shall be borne by the owners of

the property or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done by quarantine regulations or authorities even though the same may have been done by carrier's officers, agents, or employees, nor for detention, loss, or damage of any kind occasioned by quarantine or the enforcement thereof. No carrier shall be liable, except in case of negligence, for any mistake or inaccuracy in any information furnished by the carrier, its agents, or officers as to quarantine laws or regulations. The shipper shall hold the carriers harmless from any expense they may incur, or damages they may be required to pay, by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at such place.

Sec. 2. (a) No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value plus freight charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant

that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

(c) Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: Provided, That the carrier reimburse the claimant for the premium paid thereon.

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton or cotton linters is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership (and prompt notice thereof shall be given to the consignor), and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 4. (a) Property not removed by the party entitled to receive it within the free time allowed by tariffs, lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouseman, only, or

at the option of the carrier, may be removed to and stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

(b) Where nonperishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it, or said consignee or party entitled to receive it fails to receive it within 15 days after notice of arrival shall have been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier: Provided, That the carrier shall have first mailed, sent, or given to the consignor notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, or, if shipped order notify, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks, in a newspaper in general circulation at the place of sale or nearest place where such newspaper is published: Provided, That 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

(c) Where perishable property which has been transported hereunder to destination is refused by consignee or party entitled to receive it, or said consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent deterioration or further deterioration, sell the same to the best advantage at private or public sale: Provided, That if time serves for notification to the consignor or owner of the refusal of the property or the failure to receive it and request for disposition of the property, such notification shall be given, in such manner as the exercise of due diligence requires, before the property is sold.

(d) Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law.

(e) The proceeds of any sale made under this section shall be applied by the carrier to payment of freight, demurrage, storage, and any other lawful charges and the expense of notice, advertisement, sale, and other necessary expense and of caring for and maintaining the property, if proper care of the same requires special expense, and should there be a balance it shall be paid to the owner of the property sold hereunder.

(f) Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and, except in case of carrier's negligence, when received from or delivered to such stations, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from locomotive or train or until loaded into and after unloaded from vessels.

Sec. 5. No carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 6. Every party, whether principal or agent, shipping explosives or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage caused by such goods, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may

lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. Provided, that, where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and, in such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. On shipments reconsigned or diverted by an agent who has furnished the carrier in the reconsignment or diversion order with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. If the reconsignor or diverter has given to the carrier erroneous information

as to who the beneficial owner is, such reconsignor or diverter shall himself be liable for all such charges.

If a shipper or consignor of a shipment of property (other than a prepaid shipment) is also the consignee named in the bill of lading and, prior to the time of delivery, notifies, in writing, a delivering carrier by railroad (a) to deliver such property at destination to another party, (b) that such party is the beneficial owner of such property, and (c) that delivery is to be made to such party only upon payment of all transportation charges in respect of the transportation of such property, and delivery is made by the carrier to such party without such payment, such shipper or consignor shall not be liable (as shipper, consignor, consignee, or otherwise) for such transportation charges but the party to whom delivery is so made shall in any event be liable for transportation charges billed against the property at the time of such delivery, and also for any additional charges which may be found to be due after delivery of the property, except that if such party prior to such delivery has notified in writing the delivering carrier that he is not the beneficial owner of the property, and has given in writing to such delivering carrier the name and address of such beneficial owner, such party shall not be liable for any additional charges which may be found to be due after delivery of the property; but if the party to whom delivery is made has given to the carrier erroneous information as to the beneficial owner, such party shall nevertheless be liable for such additional charges. If the shipper or consignor has given to the delivering carrier erroneous information as to who the beneficial owner is, such shipper or consignor shall himself be liable for such transportation charges, notwithstanding the foregoing provisions of this paragraph and irrespective of any provisions to the contrary in the bill of lading or in the contract of transportation under which the shipment was made. The term "delivering carrier" means the line-haul carrier making ultimate delivery.

Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of

lading, the freight charges must be paid upon the articles actually shipped.

Where delivery is made by a common carrier by water the foregoing provisions of this section shall apply, except as may be inconsistent with Part III of the Interstate Commerce Act.

Sec. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election of common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. (a) If all or any part of said property is carried by water over any part of said route, and loss, damage or injury to said property occurs while the same is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water (this bill of lading being such bill of lading if the property is transported by such water carrier thereunder) and by and under the laws and regulations applicable to transportation by water. Such water carriage shall be performed subject to all the terms and provisions of, and all the exemptions from liability contained in the Act of the Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc.," and of other statutes of the United States according carriers by water the protection of limited liability, as well as the following subdivisions of this section, and to the conditions contained in this bill of lading not inconsistent with this section, when this bill of lading becomes the bill of lading of the carrier by water.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas or other waters, or from latent defects in hull, machinery, or appurtenances whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the property herein described shall be at liberty to call at any port or ports, in or out of the customary route, to tow and be towed, to transfer, trans-ship, or lighter, to load and discharge goods at any time, to assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence such carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry the same upon deck.

(d) General Average shall be payable according to the York-Antwerp Rules of 1924, Sections 1 to 15, inclusive, and Sections 17 to 22, inclusive, and as to matters not covered thereby according to the laws and usages of the Port of New York. If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from faults or errors in navigation, or in the management of the vessel, or from any latent or other defects in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defects or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees and/or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

(e) If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this bill of lading.

(f) The term "water carriage" in this section shall not be construed as including lighterage in or across rivers, harbors, or lakes, when performed by or on behalf of rail carriers.

Sec. 10. Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

(Revised June 15, 1941)

[fol. 372]

IN THE 107TH JUDICIAL DISTRICT COURT OF
CAMERON COUNTY, TEXAS

PLAINTIFF'S EXHIBITS COUNT I, P-2

((See opposite) 13

DIVERSION ORDER
ELMORE AND STAHL

Pharr, Texas

File No.

Mr. **MCCARTY**

JUNE 13 195 **8**

Agent **MP** Ry. Co.

Confirming Telephone **Elversion**

PHARR, TEXAS

M 19

Please refer to car initial **ART** No. **35042** contents **HONEYDEWS**

shipped from **RIO GRANDE CITY, TEXAS** Date **JUNE 12** 195 **8**

billed to **ELMORE & STAHL, ST. LOUIS, MO. (MP)**

and change consignee and destination to read **LA MANTIA BROS. ARRIGO CO.**

CHICAGO, ILLINOIS

Route **MP IC**

Protect lowest one factor through rate. Please also take up promptly by wire so there will be no delay in forwarding the car to its destination. Carrier shall not make delivery of this shipment without payment of freight and all other lawful charges. (See Section 7 of conditions of uniform bill of lading.)

Special Instructions: **SERVICE AS BILLED-SHOW WEIGHT AS 30,000 LBS MINIMUM - RATE 1.51**

Received for the **MP** Ry. Co.

at **June 13** 195 **8**

By **W. J. McCarty**

ELMORE AND STAHL

By **LD**


MC 818173

372

[fol. 373]

IN THE 107TH JUDICIAL DISTRICT COURT OF
CAMERON COUNTY, TEXAS

PLAINTIFF'S EXHIBITS COUNT I, P-4

(See opposite) 

5

J





SOLD FOR
ACCOUNT OF ABOVE BY

DETACH ABOVE VOUCHER AT PERFORATION BEFORE DEPOSITING
LA MANTIA BROS. ARRIGO CO.
COMMISSION MERCHANTS

801666

28-30-32
SOUTH WATER MARKET
CHICAGO, ILL.
PHONE CANAL 8-8100



XXXX

REC'D

CMSTP

CAR NO. OR
TRUCK LINE

ART 38042

FILE
NUMBER

170285

FOLIO
NUMBER

36750

628 98 HONEY DEWS - AVERAGE 2 27
180 @ 3 00 337 @ 2 25 1 @ 1 50
92 @ 1 25 18 @ .50
6 SHRUNK
6 EMPTY LEFT IN CAR

1423 75

OK 1
P-4

GOVT INSPECTION CERTIFICATE ATTACHED

H78

REMARKS

INSPECTION
ICE

10 00

CHARGES

DEM.
UNLOADING
FREIGHT
CARTAGE
TRANS. TAX
COMMISSION

30 91
605 92
69 74
2 09
142 38

861 04

E. & O. E. NET PROCEEDS

562 71

60072


SALES OF ALL ITEMS SUBJECT TO PRICE CONTROL IN THIS ACCOUNTING ARE BELIEVED TO CONFORM TO OPA
REGULATION. WE RESERVE THE RIGHT TO REVISE WITHOUT PREJUDICE ANY AND ALL ACCOUNTINGS TO
CONFORM TO SUBSEQUENT CLARIFICATIONS AND INTERPRETATIONS OF THE OFFICE OF PRICE ADMINISTRATION.
UNITED STATES DEPARTMENT OF AGRICULTURE LICENSE NO. 868

373

[fol. 374]

IN THE 107TH JUDICIAL DISTRICT COURT OF
CAMERON COUNTY, TEXAS

PLAINTIFF'S EXHIBITS COUNT I, P-5

(See opposite) 

FORM PV-303
(1-1-57)

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE
INSPECTION CERTIFICATE

I- 32289
I- 32289

ORIGINAL

This certificate is issued in compliance with the regulations of the Secretary of Agriculture governing the inspection of various products pursuant to the Agricultural Marketing Act of 1946, as amended (7 U.S.C. 1621 et seq.), and is admissible as prima facie evidence in all cases of the United States. **WARNING:** Any person who knowingly shall falsely make, issue, alter, forge, or counterfeit this certificate, or participate in any of such actions, is subject to a fine of not more than \$1,000 or imprisonment for not more than one year, or both.

Market Chicago Date June 18, 1958 Hour 1:30 PMDS
To LaMantia Bros. Arrigo Co. Address Chicago, Illinois
(Applicant)
Shipper Not given Address Texas
Receiver LaMantia Bros. Arrigo Co. Address Chicago, Illinois

I certify that in accordance with instructions issued by the Secretary of Agriculture pursuant to authority conferred upon him by law, I inspected, at the time and on the date stated above, samples of the following lot of products, and that the quality and/or condition as shown by said samples, at said time and on said date were as stated below:

Car No. 3 ART Where National Tea Co. Siding
Truck License 35042 Kind Fan Refrigerator Inspected National Tea Co. Siding

Condition of equipment: Hatch covers closed, plugs in, ice in bunkers approximately 1 foot from top. Fan control lever in "ON" position.

Products inspected: HONEY DEW MELONS in crates labeled "E & S Brand Elmore and Stahl Distributed by Elmore and Stahl Pharr, Texas", stamped to denote size; 9's noted.

Condition of load: Car partly unloaded; each end of car loaded to near doorway, 8 layers, 4 rows, crosswise; vertical strips at corners of crates.

Condition of pack: Tight; excelsior in bottom of crates.

Temperature of products: Stack nearest doorway: Top 46°F.; Bottom 40°F.

Size: Fairly uniform sizing in crates.

Quality: Mature, clean and well formed. Grade defects average 6%, mostly scars.

Condition: Generally hard to firm; white to cream color. In most samples 1 to 4 melons per crate, some none, average approximately 15% damaged by light to dark brown discoloration, some of which is sunken, occurring over 1/8 to 1/2 of surface. In most samples none, some 1 or 2 melons per crate, average approximately 3% decay, Bacterial Soft Rot, generally in advanced stages.

Grade: Now fails to grade U. S. No. 1 only account discoloration and decay.

170285 (5) 801666

This certificate is issued in compliance with the regulations of the Secretary of Agriculture governing the inspection of various products pursuant to the Agricultural Marketing Act of 1946, as amended (7 U.S.C. 1621 et seq.), and is admissible as prima facie evidence in all courts of the United States. WARNING: Any person who knowingly shall falsely make, issue, alter, forge, or counterfeit this certificate, or participate in any of such actions, is subject to a fine of not more than \$1,000 or imprisonment for not more than one year, or both.

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 Shipper Not given (Applicant) Address Texas
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 Truck License ☐ 35042 Kind Fan Refrigerator inspected

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Condition of load: Car partly unloaded; each end of car loaded to rear doorway, 8 layers, 4 rows, crosswise; vertical strips at corners of crates.

Condition of packs: Tight; excelsior in bottom of crates.

Temperature of product: Stack nearest doorway: Top 46°F.; Bottom 40°F. **ES 3406**

Size: Fairly uniform sizing in crates.

Quality: Mature, clean and well formed. Grade defects average 6%, mostly scars.

Condition: Generally hard to firm; white to cream color. In most samples 1 to 4 melons per crate, some none, average approximately 15% damaged by light to dark brown discoloration, some of which is sunken, occurring over 1/8 to 1/2 of surface. In most samples none, some 1 or 2 melons per crate, average approximately 3% decay, Bacterial Soft Rot, generally in advanced stages.

Grade: Now fails to grade U. S. No. 1 only account discoloration and decay.

Remarks: Inspection and certificate restricted to product in 1 complete stack each side of doorway and 2 upper layers in remainder of load in portion of load remaining in car at time of inspection.



Fee \$10.00
 Expenses _____
 Total _____

Sam J. Gennaro
 Sam J. Gennaro
 Room 1160 - 610 S. Canal St.
 Address Chicago 7, Illinois

PLEASE REFER TO THIS CERTIFICATE BY NUMBER AND MARKET

[fol. 375]

IN THE 107TH JUDICIAL DISTRICT COURT OF
CAMERON COUNTY, TEXAS

No. 37410-A

[Title omitted]

CHARGE OF THE COURT AND VERDICT OF THE JURY

CHARGE FILED: MARCH 29, 1961

VERDICT RECEIVED: MARCH 30, 1961

Ladies and Gentlemen of the Jury:

This case is submitted to you on special issues—that is, you are called on to answer some questions as to particular facts in the case, from the evidence you have heard in the trial. You are the sole judges of the credibility of the witnesses and the weight to be given to their testimony, but in matters of law, you must be governed by the instructions in this charge. In discharging your responsibility on this jury, please remember that there are standards of conduct to be lived up to, and rules to be obeyed, and that if you do not comply with them, our efforts will be wasted.

Do not let bias, prejudice, sympathy, resentment, or any such emotion play any part in your deliberations.

Do not discuss the case, or even mention it to anyone whomsoever, nor permit it to be mentioned in your hearing, except in the jury room when all jurors are present for the purpose of deliberating on the verdict. If anyone attempts to mention the case to you otherwise, you must report it to the Court at once.

Do not speculate on matters not shown by the evidence, and about which you are not asked any questions. Remember that you cannot guess your way to a just and correct verdict.

[fol. 376] Do not discuss personal experiences and be very careful not to consider or mention any personal knowledge or information you may have about any fact or person, which is not shown by the evidence you have heard in this

trial. Do not try to gather any evidence for yourselves. Your duty is to answer these questions from the evidence you have heard here, and from that alone."

Do not try to reach a verdict by lot, or chance, and do not return a quotient verdict by adding together figures, dividing by the number of jurors, and agreeing to be bound by the result. Do not do any trading on your answers—that is, some of you agreeing to answer certain questions one way if others will agree to answer other questions another way. Do not decide who you think should win and then try to answer the questions accordingly. If you do that, your verdict will be worthless, and all of our time will have been wasted. Simply answer the questions as you find the facts from the evidence, without concerning yourselves about the effect of your answers.

Keep these rules in mind at all times, and obey them strictly, until you have returned your verdict. The verdict will consist of your answers to the questions, written in the blanks provided, with the certificate signed by your foreman on the last page of this charge.

After you retire to consider your verdict, you will elect your own foreman. It is then his duty at once to read aloud, in the jury room, the first portion of this charge laying down the rules which you must obey. Listen to them again carefully at that time. After you have retired, if any juror starts to violate any of these rules, it is the duty of the other jurors to call his attention to the matter at once and [fol. 377] caution him. If any juror persists in such violation, or deliberately violates a rule, the other jurors should report the matter at once to the Court.

Definitions

The term "preponderance of the evidence," as used in this Charge, means the greater weight or degree of the credible evidence before you.

The term "inherent vice," as used in this Charge, means any existing defects, diseases, decay or the inherent nature of the commodity which will cause it to deteriorate with a lapse of time.

The term "market value," as used in this Charge, means the amount of money for which an informed seller, willing but not forced to sell, and an informed buyer, willing but not forced to buy, would sell and buy commodities of the kind, quality and pack as the commodities involved herein.

By the term "negligence," as used in this Charge, is meant the failure to use ordinary care.

The term "ordinary care" may be defined as such care as a person of ordinary prudence would have exercised under the same or similar circumstances.

Count I

Special Issue No. 1

Do you find from a preponderance of the evidence that at the time the bill of lading was signed, the honeydew melons shipped in Car ART 35042 were in such condition that, based upon the orders given by the plaintiff to the carrier for their transportation, and the reasonable performance of those orders by the carrier, they would have been reasonably expected to arrive at destination in good merchantable condition?

Answer "yes" or "no."

We, the jury, answer: Yes.

Special Issue No. 2

Do you find from a preponderance of the evidence that when Car ART 35042 arrived at Chicago, Illinois, the honeydew melons were in worse condition than would reasonably have been anticipated based upon the condition in which they were at the time the bill of lading was signed, the orders given by the plaintiff to the carrier for their transportation and reasonable performance of those orders by the carrier?

Answer "yes" or "no."

We, the jury, answer: Yes.

Count I

Special Issue No. 3

Do you find from a preponderance of the evidence that as to the honeydew melons in Car ART 35042 the defendant, and its connecting carriers, performed without negligence the transportation services as provided by the terms and conditions of the bill of lading and as instructed by the plaintiff, and in a reasonably prudent manner as to matters not covered by the bill of lading or the plaintiff's instructions?

Answer "yes" or "no."

We, the jury, answer: Yes.

Special Issue No. 4

Do you find from a preponderance of the evidence that the arrival of honeydew melons in Car ART 35042 in a [fol. 379] worsened condition, if you have so found in answer to Special Issue No. 2, was not in any part caused by the failure of the defendant carrier and its connecting carriers to comply with the instructions of the shipper and furnish all services provided by the terms and conditions of the bill of lading issued in said Car ART 35042?

Answer "It was not due to the failure of the carrier" or "no".

We, the jury, answer: It was not due to the failure of the carrier.

Count I

Special Issue No. 5

Do you find from a preponderance of the evidence that the arrival of honeydew melons in Car ART 35042 in a worsened condition, if you have so found in answer to Special Issue No. 2, was not in any part caused by the failure of the carrier to transport and care for the contents of Car ART 35042 in a reasonably prudent manner as to all matters not covered by plaintiff shipper's instructions and the bill of lading?

Answer "It was not due to the failure of the carrier" or "No".

We, the jury, answer: No.

Special Issue No. 6

Do you find from a preponderance of the evidence that the worsened condition, if any, of the honeydew melons in Car ART 35042 at the time of their delivery at Chicago, Illinois, was due solely to an inherent vice, as that term is herein defined, existing at the time the melons were received by the carrier at Rio Grande City, Texas, for transportation?

Answer "yes" or "no".

We, the jury, answer: No.

[fol. 380]

Count I

Special Issue No. 7

Do you find from a preponderance of the evidence that the worsened condition, if any you have found in answer to Special Issue No. 2, at destination of the honeydew melons in Car ART 35042 was caused solely by carrying out the instructions for handling this shipment given by the shipper to the carrier, although these instructions, together with the obligations of the defendant under the bill of lading and in the performance of all other matters not covered by the bill of lading and the instructions were carried out in a reasonably prudent manner, if you have so found?

Answer "yes" or "no".

We, the jury, answer: No.

Count I

Special Issue No. 8

What do you find from a preponderance of the evidence to be the reasonable market value of the honeydew melons loaded in Car ART 35042 at Chicago, Illinois, at the time and in the condition in which they actually arrived?

Answer in dollars and cents, if any, or "none".

We, the jury, answer: \$1423.75.

Special Issue No. 9

What do you find from a preponderance of the evidence to be the market value of the honeydew melons in Car ART

35042 at Chicago, Illinois, on June 18, 1958, in the condition in which they should have been delivered there after being transported in accordance with the plaintiff's instructions and the terms and conditions of the bill of lading and in a reasonably prudent manner to all matters not covered by [fol. 381] the bill of lading or the instructions?

Answer in dollars and cents, if any, or "none".

We, the jury, answer: \$1920.00.

Count II

Special Issue No. 1

Do you find from a preponderance of the evidence that at the time the bill of lading was signed, the honeydew melons shipped in Car ART 33450 were in such condition that, based upon the orders given by the plaintiff to the carrier for their transportation and the reasonable performance of those orders by the carrier, they would have been reasonably expected to arrive at destination in good merchantable condition?

Answer "yes" or "no".

We, the jury, answer: Yes.

Special Issue No. 2

Do you find from a preponderance of the evidence, that when Car ART 33450 arrived at Boston, Massachusetts, the honeydew melons were in worse condition than would reasonably have been anticipated based upon the condition in which they were at the time the bill of lading was signed, the orders given by the plaintiff to the carrier for their transportation and reasonable performance of those orders by the carrier?

Answer "yes" or "no".

We, the jury, answer: Yes.

Special Issue No. 3

Do you find from a preponderance of the evidence that as to the honeydew melons in Car 33450 the defendant, and its connecting carriers, performed without negligence the [fol. 382] transportation services as provided by the terms and conditions of the bill of lading and as instructed by

the plaintiff and in a reasonably prudent manner as to matters not covered by the bill of lading or the plaintiff's instructions?

Answer "yes" or "no."

We, the jury, answer: No.

Count II

Special Issue No. 4

Do you find from a preponderance of the evidence that the arrival of honeydew melons in Car ART 33450 in a worsened condition, if you have so found in answer to Special Issue No. 2 was not in any part caused by the failure of the defendant carrier and its connecting carriers to comply with the instructions of the shipper and furnish all services provided by the terms and conditions of the bill of lading issued on said Car ART 33450?

Answer "It was not due to the failure of the carrier" or "no."

We, the jury, answer: It was not due to the failure of the carrier.

Special Issue No. 5

Do you find from a preponderance of the evidence that the arrival of honeydew melons in Car ART 33450 in a worsened condition, if you have so found, in answer to Special Issue No. 2, was not in any part caused by the failure of the carrier to transport the care for the contents of Car ART 33450 in a reasonably prudent manner as to all matters not covered by plaintiff shipper's instructions and the bill of lading?

[fol. 383] Answer "It was not due to the failure of the carrier" or "no".

We, the jury, answer: No.

Count II

Special Issue No. 6

Do you find from a preponderance of the evidence that the worsened condition, if any, of the honeydew melons in Car ART 33450 at the time of their delivery, at Boston,

Massachusetts, was due solely to an inherent vice, as that term is herein defined, existing at the time the melons were received by the carrier at Rio Grande City, Texas, for transportation?

Answer "yes" or "no".

We, the jury, answer: No.

Count II

Special Issue No. 7

Do you find from a preponderance of the evidence that the worsened condition, if any you have found in answer to Special Issue No. 2, at destination of the honeydew melons in Car ART 33450 was caused solely by carrying out the instructions for handling this shipment given by the shipper to the carrier, although these instructions, together with the obligations of the defendant under the bill of lading and in the performance of all other matters not covered by the bill of lading and the instructions were carried out in a reasonably prudent manner, if you have so found?

Answer "yes" or "no".

We, the jury, answer: No.

[fol. 384]

Count II

Special Issue No. 8

What do you find from a preponderance of the evidence to be reasonable market value of the honeydew melons loaded in Car ART 33450 at Boston, Massachusetts, at the time and in the condition in which they actually arrived?

Answer in dollars and cents, if any, or "none."

We, the jury, answer: \$2736.25.

Special Issue No. 9

What do you find from a preponderance of the evidence to be the market value of the honeydew melons in Car ART 33450 at Boston, Massachusetts, on June 9, 1958, in the condition in which they should have been delivered there after being transported in accordance with the plaintiff's instructions and the terms and conditions of the bill of

lading and in a reasonably prudent manner to all matters not covered by the bill of lading or the instructions?

Answer in dollars and cents, if any, or "none".

We, the jury, answer: \$2985.75.

Count III

Special Issue No. 1

Do you find from a preponderance of the evidence that at the time the bill of lading was signed, the honeydew melons shipped in Car ART 51395 were in such condition that, based upon the orders given by the plaintiff to the carrier for their transportation, and the reasonable performance of those orders by the carrier, they would have been reasonably expected to arrive at destination in good merchantable condition?

[fol. 385] Answer "yes" or "no".

We, the jury, answer: No.

Special Issue No. 2

Do you find from a preponderance of the evidence that when Car ART 51395 arrived at Boston, Massachusetts, the honeydew melons were in worse condition than would reasonably have been anticipated based upon the condition in which they were at the time the bill of lading was signed, the orders given by the plaintiff to the carrier for their transportation and reasonable performance of those orders by the carrier?

Answer "yes" or "no."

We, the jury, answer: Yes.

Count III

Special Issue No: 3

Do you find from a preponderance of the evidence that as to the honeydew melons in Car ART 51395 the defendant, and its connecting carriers, performed without negligence the transportation services as provided by the terms and conditions of the bill of lading and as instructed by the plaintiff and in a reasonably prudent manner as to matters

not covered by the bill of lading or the plaintiff's instructions?

Answer "yes" or "no".

We, the jury, answer: No.

Count III

Special Issue No. 4

Do you find from a preponderance of the evidence that the arrival of honeydew melons in Car ART 51395 in a worsened condition if you have so found in answer to Special Issue No. 2, was not in any part caused by the [fol. 386] failure of the defendant carrier and its connecting carriers to comply with the instructions of the shipper and furnish all services provided by the terms and conditions of the bill of lading issued on said Car ART 51395?

Answer "It was not due to the failure of the carrier" or "no."

We, the jury, answer: It was not due to the failure of the carrier.

Special Issue No. 5

Do you find from a preponderance of the evidence that the arrival of honeydew melons in Car ART 51395 in a worsened condition, if you have so found in answer to Special Issue No. 2, was not in any part caused by the failure of the carrier to transport and care for the contents of Car ART 51395 in a reasonably prudent manner as to all matters not covered by plaintiff shipper's instructions and the bill of lading?

Answer "It was not due to the failure of the carrier" or "no."

We, the jury, answer: No.

Count III

Special Issue No. 6

Do you find from a preponderance of the evidence that the worsened condition, if any, of the honeydew melons in Car ART 51395 at the time of their delivery at Boston, Massachusetts, was due solely to an inherent vice, as that

term is herein defined, existing at the time the melons were received by the carrier at Rio Grande City, Texas, for transportation?

Answer "yes" or "no".

We, the jury, answer: No.

[fol. 387]

Count III

Special Issue No. 7

Do you find from a preponderance of the evidence that the worsened condition, if any you have found in answer to Special Issue No. 2, at destination of the honeydew melons in Car ART 51395 was caused solely by carrying out the instructions for handling this shipment given by the shipper to the carrier, although these instructions, together with the obligations of the defendant under the bill of lading and in the performance of all other matters not covered by the bill of lading and the instructions were carried out in a reasonably prudent manner, if you have so found?

Answer "yes" or "no".

We, the jury, answer: No.

Count III

Special Issue No. 8

What do you find from a preponderance of the evidence to be the reasonable market value of the honeydew melons loaded in Car ART 51395 at Boston, Massachusetts, at the time and in the condition in which they actually arrived?

Answer in dollars and cents, if any, or "none".

We, the jury, answer: \$1063.90.

Special Issue No. 9

What do you find from a preponderance of the evidence to be the market value of the honeydew melons in Car ART 51395 at Boston, Massachusetts, on June 25, 1958, in the condition in which they should have been delivered there after being transported in accordance with the plaintiff's [fol. 388] instructions and the terms and conditions of the

bill of lading and in a reasonably prudent manner to all matters not covered by the bill of lading or the instructions?

Answer in dollars and cents, if any, or "none".

We, the jury, answer: \$1120.00.

Count IV

Special Issue No. 1

Do you find from a preponderance of the evidence that at the time the bill of lading was signed, the peppers shipped in Car ART 52223 were in such condition that, based upon the orders given by the plaintiff to the carrier for their transportation, and the reasonable performance of those orders by the carrier, they would have been reasonably expected to arrive at destination in good merchantable condition?

Answer "yes" or "no".

We, the jury, answer: Yes.

Special Issue No. 2

Do you find from a preponderance of the evidence that when Car ART 52223 arrived at Indianapolis, Indiana, the peppers were in worse condition than would reasonably have been anticipated based upon the condition in which they were at the time the bill of lading was signed, the orders given by the plaintiff to the carrier for their transportation and reasonable performance of those orders by the carrier?

Answer "yes" or "no."

We, the jury, answer: Yes.

Count IV

Special Issue No. 3

Do you find from a preponderance of the evidence that [fol. 389] as to peppers in Car ART 52223 the defendant, and its connecting carriers, performed without negligence the transportation services as provided by the terms and conditions of the bill of lading and as instructed by the plaintiff and in a reasonably prudent manner as to matters not covered by the bill of lading or the plaintiff's instructions?

Answer "yes" or "no".

We, the jury, answer: No.

Special Issue No. 4

Do you find from a preponderance of the evidence that the arrival of Peppers in Car ART 52223 in a worsened condition, if you have so found in answer to Special Issue No. 2, was not in any part caused by the failure of the defendant carrier and its connecting carriers to comply with the instructions of the shipper and furnish all services provided by the terms and conditions of the bill of lading issued on said Car ART 62223?

Answer "It was not due to the failure of the carrier" or "no".

We, the jury, answer: No.

Count IV

Special Issue No. 5

Do you find from a preponderance of the evidence that the arrival of peppers in Car ART 52223 in a worsened condition, if you have so found in answer to Special Issue No. 2, was not in any part caused by the failure of the carrier and its connecting carriers to transport and care for the contents of Car ART 52223 in a reasonably prudent manner as to all matters not covered by plaintiff shipper's instructions and the bill of lading?

Answer "It was not due to the failure of the carrier" or "no."

[fol. 390] We, the jury, answer: No.

Special Issue No. 6

Do you find from a preponderance of the evidence that the worsened condition, if any, of the peppers in Car ART 52223 at the time of their delivery at Indianapolis, Indiana, was due solely to an inherent vice, as that term is herein defined, existing at the time the peppers were received by the carrier at Rio Grande City, Texas, for transportation?

Answer, "yes" or "no".

We, the jury, answer: No.

Count IV

Special Issue No. 7

Do you find from a preponderance of the evidence that the worsened condition, if any you have found in answer to Special Issue No. 2, at destination of the peppers in Car ART 52223 was caused solely by carrying out the instructions for handling this shipment given by the shipper to the carrier, although these instructions, together with the obligations of the defendant under the bill of lading and in the performance of all other matters not covered by the bill of lading and the instructions were carried out in a reasonably prudent manner, if you have so found?

Answer "yes" or "no".

We, the jury, answer: No.

Count IV

Special Issue No. 8

What do you find from a preponderance of the evidence to be the reasonable market value of the peppers loaded in Car ART 52223 at Indianapolis, Indiana, at the time and in [fol. 391] the condition in which they actually arrived?

Answer in dollars and cents, if any, or "none".

We, the jury, answer: \$1901.45.

Special Issue No. 9

What do you find from a preponderance of the evidence to be the market value of the peppers in Car ART 52223 at Indianapolis, Indiana, on June 26, 1958, in the condition in which they should have been delivered there after being transported in accordance with the plaintiff's instructions and the terms and conditions of the bill of lading and in a reasonably prudent manner to all matters not covered by the bill of lading or the instructions?

Answer in dollars and cents, if any, or "none."

We, the jury, answer: \$2674.00.

After you retire to your jury room, you should select one of your members as your "Foreman." It is his duty:

1. To preside during your deliberations.

2. See that your deliberations are conducted with propriety.

3. Communicate with the Court In Writing on any matter requiring further instructions or assistance. The Court will attempt to answer and give you further instructions on any questions of law, but you are the sole judges of the facts and the Court is not permitted to answer any questions which would constitute a comment on the evidence or tend to advise you which way to answer a particular Special Issue.

4. Vote upon each issue in order and do not try to determine who should win or lose the case and then answer the issues accordingly.

[fol. 392] 5. Write your answers to the issues in the spaces provided.

6. To certify to your verdict in the certificate attached to this page.

Your answers must be by unanimous vote. In voting upon your answers, you may do so orally, in writing, by show of the hands, or in any other fair manner convenient to you; but you must not reach a verdict by lot, chance nor trading upon your answers.

After you have retired to consider your verdict, no one has any authority to communicate with you except the officer who has you in charge, and he can only inquire if you have agreed upon a verdict.

When you have answered all of the foregoing questions as requested, and your Foreman has placed your answers in the spaces provided, you will advise the officer in charge at the door of the jury room that you have reached a verdict, whereupon you will return into court with your verdict.

Hawthorne Phillips, Judge Presiding.

We, the Jury, Have Answered the Above and Foregoing Special Issues as Herein Indicated, and Herewith Return Them Into Court as Our Verdict.

Donald C. Osborn, Foreman.

[File endorsement omitted]

[fol. 393]

IN THE 107TH JUDICIAL DISTRICT COURT OF
CAMERON COUNTY, TEXAS

Number 34710-A

[Title omitted]

DEFENDANT'S MOTION FOR JUDGMENT, MOTION TO DISREGARD
FINDINGS, MOTION FOR JUDGMENT NON OBSTANTE VERE-
DICTO AND MOTION TO REQUIRE REMITTITUR—Filed May
25, 1961

To the Honorable Judge of Said Court:

Now comes Missouri Pacific Railroad Company, defend-
ant in the above entitled and numbered cause, and files this
Motion for Judgment, Motion to Disregard Findings, Mo-
tion for Judgment Non Obstante Veredicto and Motion to
Require Remittitur, as follows:

I

Motion for Judgment on Count One

(a) The jury has found in response to that portion of the
verdict designated Count I, Special Issue Number 3 as
follows:

"... That as to the honeydew melons in Car ART
35042 the defendant; and its connecting carriers, per-
formed without negligence the transportation services
as provided by the terms and conditions of the bill of
lading and as instructed by the plaintiff and in a reason-
ably prudent manner as to matters not covered by the
bill of lading or the plaintiff's instructions."

[fol. 394] Such findings constitute a complete defense
herein to the cause of action asserted by Plaintiff in its
pleadings, and under the evidence and verdict herein. Plain-
tiff has elected to prosecute its case herein on the theory of
a prima facie case and has not alleged any specific acts or
omissions constituting negligence on the part of the car-
riers; neither does the verdict contain any specific finding

of negligence on the part of the carriers. There is no basis in the verdict or in ultimate facts established conclusively by the evidence for rendition of a judgment in favor of the Plaintiff and against the Defendant on Count I of this case. In particular, Rules 130 and 135 of the applicable Perishable Protective Tariffs which were in effect at the time of the shipment in question, copies of which were offered in evidence in this case, effectively prevent a judgment in favor of the Plaintiff, and relieve the carriers of liability herein, in the absence of specific findings of negligence and proximate cause.

(b) The jury has further found in response to that portion of the verdict designated Count I, Special Issue Number 4, as follows:

"... That the arrival of the honeydew melons in Car ART 35042 in a worsened condition, was not in part caused by the failure of the defendant carrier to comply with the instructions of the shipper and furnish all services provided by the terms and conditions of the bill of lading issued on said Car ART 35042."

[fol. 395] Such a finding also constitutes a complete defense herein to the cause of action asserted in Plaintiff's Petition on Count I. Plaintiff expressly relied upon the bill of lading as the basis of its cause of action. The above mentioned finding by the jury effectively buttresses the finding made in answer to Special Issue No. 3 of Count I, and wipes out any possible recovery by Plaintiff based upon any alleged breach of the contract evidenced by the bill of lading.

There was no allegation, no evidence and no issue as to any other matters not covered by shipper's instructions or the bill of lading. The findings of the jury in answer to any of the other Special Issues relating to Count I do not, in any way, furnish any basis for rendition of judgment in favor of Plaintiff or against the carrier.

Wherefore, premises considered, Defendant prays that on Count I of the Petition judgment be entered that Plaintiff take nothing and that Defendant go hence with its costs without day.

II

Motion for Judgment on Count Two

(a) The jury has found in response to that portion of the verdict designated Count II, Special Issue Number 4, as follows:

"... That the arrival of honey dew melons in Car ART 33450 in a worsened condition was not in part caused by the failure of the defendant carrier to comply with the instructions of the shipper and furnish all services provided by the terms and conditions of the [fol. 396] bill of lading issued on said car ART 35042."

Defendant says that such finding constitutes a complete defense herein to the cause of action asserted in Plaintiff's Petition on said Count II. Plaintiff expressly relied upon the bill of lading as the basis of its cause of action. The above-mentioned finding by the jury effectively eliminates any possible recovery by Plaintiff based upon any alleged breach of the contract evidenced by the bill of lading.

There was no allegation, no evidence and no issue as to any other matters not covered by shipper's instructions or the bill of lading. The findings of the jury in answer to any of the other Special Issues relating to Count II do not, in any way, furnish any basis for rendition of judgment in favor of Plaintiff or against the carriers.

Wherefore, premises considered, Defendant prays that on Count II of the Petition, judgment be entered that Plaintiff take nothing and that Defendant go hence with its costs without day.

III

Motion for Judgment on Count Three

Defendant moves the Court for judgment in its favor on Count Three of Plaintiff's Petition, for the following reasons:

(a) The finding of the jury in response to that portion of the verdict designated Count III, Special Issue Number 1, prevents a judgment in favor of Plaintiff on said Count

and requires entry of a judgment in favor of Defendant. Because the jury answered such Special Issue "No", Plaintiff has failed to establish that the honeydew melons shipped in Car ART 51395 were in such condition that, based upon [fol. 397] the orders given by the Plaintiff to the carrier for their transportation and the reasonable performance of those orders by the carrier, they would have been reasonably expected to arrive at destination in good merchantable condition. Plaintiff has relied herein upon allegations of a prima facie case, only, and has not alleged or secured jury findings of any specific acts of negligence on the part of the carriers. There is no other basis in the evidence or jury findings for a judgment in favor of Defendant in connection with the said count III.

Wherefore, premises considered, Defendant prays that on Count III of the Petition, judgment be rendered that Plaintiff take nothing and that Defendant go hence with its costs without day.

IV

Motion to Disregard Findings and for Judgment Non Obstante Verdicto

Defendant moves the Court to disregard the findings of the jury on the following Special Issues:

(a) On Count I the Court should disregard the findings on Special Issues Numbers 1, 2, 5, 6, 7 and 9.

(b) On Count II the Court should disregard the findings on Special Issues Numbers 1, 2, 3, 5, 6, 7 and 9.

(c) On Count III the Court should disregard the findings on Special Issues Numbers 2, 3, 5, 6, 7 and 9.

(d) On Count IV the Court should disregard the findings on Special Issues Numbers 1, 2, 3, 4, 5, 6, 7 and 9.

(e) Said enumerated findings should be disregarded for the following reasons:

(1) As to Special Issues Numbers 1 in Counts I, II and IV there is no evidence, or at least insufficient evidence, [fol. 398] to support the finding, or even raise the issue as

to whether the commodity shipped, in each instance, was in such condition that, based upon the orders given by the Plaintiff to the carrier for their transportation, and the reasonable performance of those orders by the carrier, they would have been reasonably expected to arrive at destination in good merchantable condition. As to the commodities involved in Counts I and II there was no inspection at origin by the United States Department of Agriculture, nor was there any testimony by any witness who could say that he actually saw such commodities at origin and knew the quality and condition of same, and there is, therefore, not even a scintilla of evidence to support the said jury findings as to condition of such commodities at origin. The findings on Count IV are more fully hereinafter mentioned at a later point in this motion and motion for remittitur.

(2) As to special Issues Number 2 in Counts I, II, III and IV, there is no evidence, or at least insufficient evidence, to support the findings, or even raise the issue as to whether the commodity shipped, in each instance, at destination was in worse condition than would reasonably have been anticipated based upon the condition in which it was at the time the bill of lading was signed, the orders given by the Plaintiff to the carrier for their transportation and reasonable performance of those orders by the carrier. This is particularly true as to Counts I, II and III because there was no competent evidence of the condition and quality of such commodities at origin, and therefore, no proper comparison could be drawn or made with the condition at destination, in each instance. As to Count IV the evidence conclusively shows that two different grades of [fol. 399] were involved (some U.S. #1 and some U.S. #2); that all of such Peppers were transported in the same car under the same conditions, but that at destination one lot (the alleged U.S. Lot #1) was in much worse condition than the other. Such undisputed evidence, offered by Plaintiff, conclusively shows that the condition at destination was caused by conditions existing at origin and by the inherent perishable nature and inherent vice of the commodity, and was not caused by Railroad handling, transportation or fault of the carriers.

(3) As to Special Issues Number 3 in Counts II and III, the findings of the Jury are immaterial and not controlling for the following reasons:

(A) On Count II and III the Jury found in answer to Special Issue Number 4, that the arrival of the commodities in a worsened condition, was not in any part caused by the failure of the carriers to comply with the instructions of the shipper and furnish all services provided by the terms and conditions of the bill of lading issued on the cars involved. Such findings on said Special Issues Number 4 would render any finding under Special Issue Number 3, involving such matters, immaterial.

B. On Counts II, III and IV, there is no evidence or at least insufficient evidence to support the jury findings on Special Issue Number 3.

(4) As to Special Issue Number 4 in Count IV, there is no evidence, or at least insufficient evidence, to support the jury finding made thereon.

(5) As to Special Issues Number 5 in Counts I, II, III and IV, the pleadings and evidence did not raise any issue as to the failure of the carriers to transport and care for [fol. 400] the contents of the Cars involved in a reasonably prudent manner, in each instance, as to matters not covered by Plaintiff shipper's instruction and bill of lading. The findings on such Special Issues Number 5 of each Count are therefore, not controlling, are immaterial and should be disregarded.

(6) As to Special Issues Number 6 in Counts I, II, III and IV, there is no evidence, or at least insufficient evidence to support the jury findings thereon, the same are immaterial and not controlling and should be disregarded.

(7) As to Special Issues Number 7 in Counts I, II, III and IV, there is no evidence, or at least insufficient evidence to support the jury findings thereon, the same are immaterial and not controlling and should be disregarded.

(8) As to Special Issues Number 9 in Counts I, II, III and IV, the same should be disregarded for the following reasons:

A. As to Counts I, II and III, there is no evidence, or at least insufficient evidence to support said findings on Special Issue Number 9 because the condition in which the commodities, in each instance, should have arrived cannot and could not be ascertained because the condition of said commodities at origin was not established by competent evidence. In a preceding portion of this motion to disregard findings, Defendant has moved the Court to disregard, among others, the finding in answer to Special Issue Number 1 of Counts I, II and IV. When and if such action is taken the finding on Special Issue Number 9 of said Counts will be meaningless because there will then be no basis upon which the condition at destination, in each instance [fol. 401] stance could be or could have been ascertained.

B. As to Count IV the evidence conclusively shows that two different grades of Peppers were transported in the same car under the same conditions, but that at destination one lot (the alleged U.S. #1) was in much worse condition than the other. Such undisputed evidence, offered by Plaintiff, conclusively shows that the conditions at destination was caused by conditions existing at origin and by the inherent perishable nature and inherent vice of the commodity and was not caused by Railroad handling, transportation or fault of the Carriers.

C. The jury finding on Special Issue Number 9 of Count IV in the amount of \$2,574.00 is not supported by the evidence.

The U.S.D.A. market quotations show that on the date the car was due and available (6-25-58) the quotations on large peppers, which would cover the U.S. #1's in this case, was 3.00-3.50. There were no quotes which would cover the U.S. #2's. The car was not unloaded and sold until the next day (6-26-58) after arrival. On 6-26-58 the U.S.D.A. market quotations on large peppers was 3.00-3.25. Again, there were no quotes for the #2's. Mr. Ed Baker, the only witness for Plaintiff who attempted to testify about the alleged loss on this shipment, at several times during his testimony said that he could not testify as to market values of the particular shipment and that he was not qualified to give an opinion as to such market values. He did say that

U.S. #1 was a better grade of peppers than U.S. #2, and that U.S. #2's usually sold for about 50 cents a basket less than #1's.

[fol. 402] On the basis of the *high* U.S.D.A. quotation for 6-25-58 the shipment had the following value and shipper suffered the following loss:

U.S. #1's—448 at 3.50	1,568.00
U.S. #2's—252 at 3.00	756.00
	<hr/>
Total value	2,324.00
Sales	1,901.45
	<hr/>
Loss on such basis	422.55

On the basis of the low U.S.D.A. quotation for 6-25-58 the shipment had the following value and shipper suffered the following loss:

U.S. #1's—448 at 3.00	1,344.00
U.S. #2's—252 at 2.50	630.00
	<hr/>
Total value	1,974.00
Sales	1,901.45
	<hr/>
Loss, on such basis	72.55

On the basis of average prices, arrived at by calculation, the shipment had the following value and shipper suffered the following loss:

U.S. #1's—448 at 3.25	1,456.00
U.S. #2's—252 at 2.75	693.00
	<hr/>
Total value	2,149.00
Sales	1,901.45
	<hr/>
Loss, on such basis	247.55

Plaintiff's loss on Count IV under the verdict is the amount of \$772.55, the difference between \$2,674.00, found on Issue 9, and \$1,901.45, found on Issue 8). It is apparent

[fol. 403] that, on any theory, such award is excessive and is not supported by evidence.

Using the market quotations for 6-25-58, as hereinabove set out, the verdict is excessive on the high quotations by \$350.00, is excessive on the average quotations by \$525.00, and is excessive on the basis of the low quotations by \$700.00.

Furthermore, shipper is chargeable with the delay in unloading the car between 6-25-58 and 6-26-58. The U.S. D.A. quotation show there was a market decline of 25 cents between the two said dates. Such decline alone amounts to \$175.00.

It is therefore apparent that the Plaintiff's maximum recovery on Count IV, which can be supported by evidence is the amount of \$247.55, (\$422.55, high market loss, less \$175.00, 25 cent market decline loss caused by shipper). The same amount of \$247.55, representing Plaintiff's actual loss can be arrived at by calculating the value of the shipment of the high quotation of 6-26-58, less 50 cents for the U.S. #2's, which is the only possible evidence which can be used in such connection. Plaintiff's loss on an average market basis on 6-26-58 was \$160.05, which was brought about by failure to unload and sell on 6-25-58. Shipper's loss, using the low quotation of 6-26-58 was the same as on the preceding date, that is, \$72.55.

There is no basis whatsoever in the evidence which will support the jury award of \$772.55. On the basis of a value of \$2,674.00, as found by the jury, each and every basket of peppers in this shipment, including the U.S. #2's would be worth \$3.82. The highest quotes one either 6-25 or 6-26-58, was \$3.50 and the evidence was that U.S. #2's sold for 50 cents less than U.S. #1's, which might bring the top price. In addition, there was no specific relation- [fol. 404] ship shown between the shipment involved and any sale covered by the U.S.D.A. Quotations.

Defendant submits that the lowest amount it is entitled to have remitted on Count IV is \$525.00 (\$772.55 less \$247.55) leaving a recovery for Plaintiff on said Count IV of \$247.55. Actually, Defendant believes that the remittitur of a greater amount is justified under the record in this

case. A remittitur of \$700.00 (\$772.55 less \$72.55) would be justified on the basis of low U.S.D.A. market quotations.

Defendant respectfully moves the Court, after disregarding one or more of the issues on each count of the Petition, to render judgment non-obstante veredicto in favor of Defendant on each count of the Petition.

Conclusion and Prayer

Defendant respectfully submits that its Motions for Judgment should be granted; that the Court should disregard the findings mentioned in Defendant's motion to Disregard; that judgment non-obstante veredicto in favor of Defendant should be rendered; that, in any event, a remittitur on Count IV should be required.

Respectfully submitted,

Missouri Pacific Railroad Company, Defendant,
Sharpe and Hardy, Attorneys for Defendant, By
T. Gilbert Sharpe, Of Counsel.

[File endorsement omitted].

[fol. 405]

IN THE 107TH JUDICIAL DISTRICT COURT OF
CAMERON COUNTY, TEXAS

No. 37410-A

[Title omitted]

MOTION FOR JUDGMENT—Filed June 2, 1961

To Said Honorable Court:

Now comes Elmore & Stahl, plaintiff in the above entitled and numbered cause, after the verdict of the jury had been returned and accepted by the Court; and makes this, plaintiff's Motion for Judgment on the jury verdict, and moves the Court to set this motion for hearing with due notice to all parties and attaches hereto the suggested judgment to be entered by the Court in accordance with the answers by the jury to the charge of the Court.

Wherefore, plaintiff prays that judgment be entered for the plaintiff in accordance with the jury verdict, and upon hearing hereof, that the attached judgment be approved and entered.

North, Blackmon & White; By Jack E. A. White,
Attorneys for Plaintiff.

[File endorsement omitted].

[fol. 406]

IN THE 107TH JUDICIAL DISTRICT COURT OF
CAMERON COUNTY, TEXAS

Ng. 37410-A

ELMORE & STAHL

VS.

MISSOURI PACIFIC RAILROAD COMPANY

JUDGMENT—June 2, 1961

On the 27th day of March, 1961, came on to be heard the above entitled and numbered cause, wherein Elmore & Stahl are plaintiffs and Missouri Pacific Railroad Company, a corporation, is defendant, and came the parties by their personal representatives and through their attorneys; all parties having announced ready for trial and said cause having duly reached its proper place upon the docket of said Court, and whereupon, this cause proceeded to trial before a jury of 12 good and lawful men and women, which jury was duly impanelled, selected and sworn; and the pleadings having been read, the evidence adduced; and after the plaintiff had rested, defendant moved for an instructed verdict, which motion was by the Court duly overruled; the charge of the Court made and arguments of counsel had, the jury retired to consider its verdict; and on the 30th day of March, 1961, returned the following verdict in the form of Special

Issues, which issues and the jury's verdict and responses thereto are as follows:

[fol. 407]

COUNT I

Special Issue No. 1

Do you find from a preponderance of the evidence that at the time the bill of lading was signed, the honeydew melons shipped in Car ART 35042 were in such condition that, based upon the orders given by the plaintiff to the carrier for their transportation, and the reasonable performance of those orders by the carrier, they would have been reasonably expected to arrive at destination in good merchantable condition?

Answer "yes" or "no".

We, the Jury, answer: Yes.

Special Issue No. 2

Do you find from a preponderance of the evidence that when Car ART 35042 arrived at Chicago, Illinois, the honeydew melons were in worse condition than would reasonably have been anticipated based upon the condition in which they were at the time the bill of lading was signed, the orders given by the plaintiff to the carrier for their transportation and reasonable performance of those orders by the carrier?

Answer "yes" or "no".

We, the jury, answer: Yes.

Special Issue No. 3

Do you find from a preponderance of the evidence that as to the honeydew melons in Car ART 35042 the defendant, and its connecting carriers, performed without negligence the transportation services as provided by the terms and conditions of the bill of lading and as instructed by the plaintiff and in a reasonably prudent manner as to matters not covered by the bill of lading or the plaintiff's instructions?

Answer "yes" or "no".

We, the jury, answer: Yes.

Special Issue No. 4

Do you find from a preponderance of the evidence that the arrival of honeydew melons in Car ART 35042 in a worsened condition, if you have so found in answer to Special Issue No. 2, was not in any part caused by the failure of the defendant carrier and its connecting carriers to comply with the instructions of the shipper and furnish all services provided by the terms and conditions of the bill of lading issued on said Car ART 35042?

Answer "It was not due to the failure of the carrier" or "no".

We, the jury, answer: It was not due to the failure of the carrier.

Special Issue No. 5

Do you find from a preponderance of the evidence that the arrival of honeydew melons in Car ART 35042 in a worsened condition, if you have so found in answer to Special Issue No. 2, was not in any part caused by the failure of the carrier to transport and care for the contents of Car ART 35042 in a reasonably prudent manner as to all matters not covered by plaintiff shipper's instructions and the bill of lading?

Answer "It was not due to the failure of the carrier" or "no".

We, the jury, answer: No.

[fol. 409]

Special Issue No. 6

Do you find from a preponderance of the evidence that the worsened condition, if any, of the honeydew melons in Car ART 35042, at the time of their delivery at Chicago, Illinois, was due solely to an inherent vice, as that term is herein defined, existing at the time the melons were received by the carrier at Rio Grande City, Texas, for transportation?

Answer "yes" or "no".

We, the Jury, answer: No.

Special Issue No. 7

Do you find from a preponderance of the evidence that the worsened condition, if any, you have found in answer

to Special Issue No. 2, at destination of the honeydew melons in Car ART 35042 was caused solely by carrying out the instructions for handling this shipment given by the shipper to the carrier although these instructions, together with the obligations of the defendant under the bill of lading and in the performance of all other matters not covered by the bill of lading and the instructions were carried out in a reasonably prudent manner, if you have so found?

Answer "yes" or "no".

We, the jury, answer: No.

Special Issue No. 8

What do you find from a preponderance of the evidence to be the reasonable market value of the honeydew melons loaded in Car ART 35042 at Chicago, Illinois, at the time and in the condition in which they actually arrived?

[fol. 410] Answer in Dollars and cents, if any, or "none".

We, the jury, answer: \$1423.75.

Special Issue No. 9

What do you find from a preponderance of the evidence to be the market value of the honeydew melons in Car ART 35042 at Chicago, Illinois, on June 18, 1958, in the condition in which they should have been delivered there after being transported in accordance with the plaintiff's instructions and the terms and conditions of the bill of lading and in a reasonably prudent manner to all matters not covered by the bill of lading or the instructions?

Answer in dollars and cents, if any, or "none".

We, the jury, answer: \$1920.00.

COUNT II

Special Issue No. 1

Do you find from a preponderance of the evidence that at the time the bill of lading was signed, the honeydew melons shipped in Car ART 33450 were in such condition that, based upon the orders given by the plaintiff to the carrier for their transportation, and the reasonable performance of those orders by the carrier, they would have been rea-

sonably expected to arrive at destination in good merchantable condition?

Answer "yes" or "no".

We, the jury, answer: Yes.

Special Issue No. 2

Do you find from a preponderance of the evidence that when Car ART 33450 arrived at Boston, Massachusetts, [fol. 411] the honeydew melons were in worse condition than would reasonably have been anticipated based upon the condition in which they were at the time the bill of lading was signed, the orders given by the plaintiff to the carrier for their transportation and reasonable performance of those orders by the carrier?

Answer "Yes" or "no".

We, the jury, answer: Yes.

Special Issue No. 3

Do you find from a preponderance of the evidence that as to the honeydew melons in Car 33450 the defendant, and its connecting carriers, performed without negligence the transportation services as provided by the terms and conditions of the bill of lading and as instructed by the plaintiff and in a reasonably prudent manner as to matters not covered by the bill of lading or the plaintiff's instructions?

Answer "yes" or "no".

We, the jury, answer: No.

Special Issue No. 4

Do you find from a preponderance of the evidence that the arrival of honeydew melons in Car ART 33450 in a worsened condition, if you have so found in answer to Special Issue No. 2, was not in any part caused by the failure of the defendant carrier and its connecting carriers to comply with the instructions of the shipper and furnish all services provided by the terms and conditions of the bill of lading issued on said Car ART 33450?

Answer "It was not due to the failure of the carrier" or "no."

We, the jury, answer: It was not due to the failure of the carrier.

[fol. 412]

Special Issue No. 5

Do you find from a preponderance of the evidence that the arrival of honeydew melons in Car ART 33450 in a worsened condition, if you have so found, in answer to Special Issue No. 2, was not in any part caused by the failure of the carrier to transport and care for the contents of Car ART 33450 in a reasonably prudent manner as to all matters not covered by plaintiff shipper's instructions and the bill of lading?

Answer "It was not due to the failure of the carrier" or "no".

We, the jury, answer: No.

Special Issue No. 6

Do you find from a preponderance of the evidence that the worsened condition, if any, of the honeydew melons in Car ART 33450 at the time of their delivery at Boston, Massachusetts, was due solely to an inherent vice, as that term is herein defined, existing at the time the melons were received by the carrier at Rio Grande City, Texas, for transportation?

Answer "yes" or "no".

We, the jury, answer: No.

Special Issue No. 7

Do you find from a preponderance of the evidence that the worsened condition, if any you have found in answer to Special Issue No. 2, at destination of the honeydew melons in Car ART 33450 was caused solely by carrying out the instructions for handling this shipment given by the shipper to the carrier, although these instructions, together with the obligations of the defendant under the bill of lading and in the performance of all other matters not covered by the bill of lading and the instructions were carried out in a reasonably prudent manner, if you have so found?

[fol. 413] Answer "yes" or "no".

We, the jury, answer: No.

Special Issue No. 8

What do you find from a preponderance of the evidence to be the reasonable market value of the honeydew melons loaded in Car ART 33450 at Boston, Massachusetts, at the time and in the condition in which they actually arrived?

Answer in dollars and cents, if any, or "none".

We, the jury, answer: \$2736.25.

Special Issue No. 9

What do you find from a preponderance of the evidence to be the market value of the honeydew melons in Car ART 33450 at Boston, Massachusetts, on June 9, 1958, in the condition in which they should have been delivered there after being transported in accordance with the plaintiff's instructions and the terms and conditions of the bill of lading and in a reasonably prudent manner to all matters not covered by the bill of lading or the instructions?

Answer in dollars and cents, if any, or "none".

We, the jury, answer: \$2985.75.

COUNT III

Special Issue No. 1

Do you find from a preponderance of the evidence that at the time the bill of lading was signed, the honeydew melons shipped in Car ART 51395 were in such condition that, based upon the orders given by the plaintiff to the carrier for their transportation, and the reasonable performance of those orders by the carrier, they would have been reasonably expected to arrive at destination in good merchantable condition?

Answer "yes" or "no".

We, the jury, answer: No.

Special Issue No. 2

Do you find from a preponderance of the evidence that when Car ART 51395 arrived at Boston, Massachusetts, the honeydew melons were in worse condition than would reasonably have been anticipated based upon the condition in which they were at the time the bill of lading was signed,

the orders given by the plaintiff to the carrier for their transportation and reasonable performance of those orders by the carrier?

Answer "yes" or "no".

We, the jury, answer: Yes.

Special Issue No. 3

Do you find from a preponderance of the evidence that as to the honeydew melons in Car ART 51395 the defendant, and its connecting carriers, performed without negligence the transportation services as provided by the terms and conditions of the bill of lading and as instructed by the plaintiff and in a reasonably prudent manner as to matters not covered by the bill of lading or the plaintiff's instructions?

Answer "yes" or "no".

We, the jury, answer: No.

Special Issue No. 4

Do you find from a preponderance of the evidence that the arrival of honeydew melons in Car ART 51395 in a worsened condition, if you have so found in answer to Special Issue No. 2, was not in any part caused by the failure of the defendant carrier to comply with the instructions of the shipper and furnish all services provided by [fol. 415] the terms and conditions of the bill of lading issued on said Car ART 51395?

Answer "It was not due to the failure of the carrier" or "No."

We, the jury, answer: It was not due to the failure of the carrier.

Special Issue No. 5

Do you find from a preponderance of the evidence that the arrival of honeydew melons in Car ART 51395 in a worsened condition, if you have so found in answer to Special Issue No. 2, was not in any part caused by the failure of the carrier to transport and care for the contents of Car ART 51395 in a reasonably prudent manner as to all matters not covered by plaintiff shipper's instructions and the bill of lading?

Answer: "It was not due to the failure of the carrier" or "no."

We, the jury, answer: No.

Special Issue No. 6

Do you find from a preponderance of the evidence that the worsened condition, if any, of the honeydew melons in Car ART 51395 at the time of their delivery at Boston, Massachusetts, was due solely to an inherent vice, as that term is herein defined, existing at the time the melons were received by the carrier at Rio Grande City, Texas, for transportation?

Answer "yes" or "no."

We, the jury, answer: No.

Special Issue No. 7

Do you find from a preponderance of the evidence that the worsened condition, if any you have found in answer to [fol. 416] Special Issue No. 2, at destination of the honeydew melons in Car ART 51395 was caused solely by carrying out the instructions for handling this shipment given by the shipper to the carrier, although these instructions, together with the obligations of the defendant under the bill of lading and in the performance of all other matters not covered by the bill of lading and the instructions were carried-out in a reasonably prudent manner, if you have so found?

Answer "yes" or "no."

We, the jury, answer: No.

Special Issue No. 8

What do you find from a preponderance of the evidence to be the reasonable market value of the honeydew melons loaded in Car ART 51395 at Boston, Massachusetts, at the time and in the condition in which they actually arrived?

Answer in dollars and cents, if any, or "none".

We, the jury, answer: \$1063.90.

Special Issue No. 9

What do you find from a preponderance of the evidence to be the market value of the honeydew melons in Car ART 51395 at Boston, Massachusetts on June 25, 1958, in the condition in which they should have been delivered there after being transported in accordance with the plaintiff's instructions and the terms and conditions of the bill of lading and in a reasonably prudent manner to all matters not covered by the bill of lading or the instructions?

Answer in dollars and cents, if any, or "none".

We, the jury, answer: \$1120.00.

[fol. 417]

COUNT IV

Special Issue No. 1

Do you find from a preponderance of the evidence that at the time the bill of lading was signed, the peppers shipped in Car ART 52223 were in such condition that, based upon the orders given by the plaintiff to the carrier for their transportation, and the reasonable performance of those orders by the carrier, they would have been reasonably expected to arrive at destination in good merchantable condition?

Answer "yes" or "no".

We, the jury, answer: Yes.

Special Issue No. 2

Do you find from a preponderance of the evidence that when Car ART 52223 arrived at Indianapolis, Indiana, the peppers were in worse condition than would reasonably have been anticipated based upon the condition in which they were at the time the bill of lading was signed, the orders given by the plaintiff to the carrier for their transportation and reasonable performance of those orders by the carrier?

Answer "yes" or "no".

We, the jury, answer: Yes.

Special Issue No. 3

Do you from a preponderance of the evidence that as to the peppers in Car ART 52223 the defendant, and its connecting carriers, performed without negligence the transportation services as provided by the terms and conditions of the bill of lading and as instructed by the plaintiff and in a reasonably prudent manner as to matters not covered by the bill of lading or the plaintiff's instructions?

[fol. 418] Answer "yes" or "no".

We, the jury, answer: No.

Special Issue No. 4

Do you find from a preponderance of the evidence that the arrival of peppers in Car ART 52223 in a worsened condition, if you have so found in answer to Special Issue No. 2, was not in any part caused by the failure of the defendant carrier and its connecting carriers to comply with the instructions of the shipper and furnish all services provided by the terms and conditions of the bill of lading issued on said Car ART 52223?

Answer "it was not due to the failure of the carrier" or "no".

We, the jury, answer: No.

Special Issue No. 5

Do you find from a preponderance of the evidence that the arrival of peppers in Car ART 52223 in a worsened condition, if you have so found in answer to Special Issue No. 2, was not in any part caused by the failure of the carrier and its connecting carriers to transport and care for the contents of Car ART 52223 in a reasonably prudent manner as to all matters not covered by plaintiff shipper's instructions and the bill of lading?

Answer "it was not due to the failure of the carrier", or "no".

We, the jury, answer: No.

[fol. 419]

Special Issue No. 6

Do you find from a preponderance of the evidence that the worsened condition, if any, of the peppers in Car ART 52223 at the time of their delivery at Indianapolis, Indiana, was due solely to an inherent vice, as that term is herein defined, existing at the time the peppers were received by the carrier at Rio Grande City, Texas for transportation?

Answer "yes" or "no".

We, the jury, answer: No.

Special Issue No. 7

Do you find from a preponderance of the evidence that the worsened condition, if any you have found in answer to Special Issue No. 2, at destination of the peppers in Car ART 52223 was caused solely by carrying out the instructions for handling this shipment given by the shipper to the carrier, although these instructions, together with the obligations of the defendant under the bill of lading and in the performance of all other matters not covered by the bill of lading and the instructions were carried out in a reasonably prudent manner, if you have so found?

Answer "yes" or "no".

We, the jury, answer: No.

Special Issue No. 8

What do you find from a preponderance of the evidence to be the reasonable market value of the peppers loaded in Car ART 52223 at Indianapolis, Indiana, at the time and in the condition in which they actually arrived?

Answer in dollars and cents, if any, or "none".

We, the jury, answer: \$1901.45.

[fol. 420]

Special Issue No. 9

What do you find from a preponderance of the evidence to be in the market value of the peppers in Car ART 52223 at Indianapolis, Indiana, on June 26, 1958, in the condition in which they should have been delivered there after being transported in accordance with the plaintiff's instructions and the terms and conditions of the bill of lading and in a

reasonably prudent manner to all matters not covered by the bill of lading or the instructions?

Answer in dollars and cents, if any, or "none".

We, the jury, answer: \$2674.00.

All special issues having been answered by the jury, the verdict was accepted by all parties, received by the Court, and entered upon the minutes of the Court; the defendant again moved the Court for an instructed verdict and for a verdict non obstante veredicto, which motion was duly overruled by the Court, and thereafter the plaintiff moved the Court to enter judgment for the plaintiff upon the verdict, which motion was duly presented to the Court, and the Court being of the opinion that plaintiff's motion for judgment should be granted,

It is therefore Ordered, Adjudged and Decreed by the Court that the plaintiff, Elmore & Stahl, do have and recover of and from the defendant, Missouri Pacific Railroad Company, the following sums:

Count I, Car ART 35042, the sum of Four Hundred Ninety-Six and 25/100 Dollars (\$496.25), plus interest from June 18, 1958 in the sum of Eighty-Four and 36/100 Dollars (\$84.36), making a total recovery for plaintiff in the sum of Five Hundred Eighty and [fol. 421] 61/100 Dollars (\$580.61).

Count II, Car No. ART 33450, the sum of Two Hundred Forty-Nine and 50/100 Dollars (\$249.50); plus interest from June 9, 1958 in the sum of Forty-Two and 75/100 Dollars (\$42.75), making a total recovery for plaintiff in the sum of \$292.25.

Count III, Car No. ART 51395, the sum of Fifty-Six and 10/100 Dollars (\$56.10), plus interest from June 25, 1958 in the sum of Nine Dollars Forty Cents (\$9.40), making a total recovery for plaintiff in the sum of Sixty-Five Dollars Fifty Cents (\$65.50).

Count IV, Car No. ART 52223, the sum of Seven Hundred Seventy-Two and 55/100 Dollars (\$772.55), plus interest from June 26, 1958 in the sum of One Hundred Thirty Dollars Ten Cents (\$130.10) making a total recovery for plaintiff in the sum of Nine Hundred Two and 65/100 Dollars (\$902.65).

It is, therefore, Ordered, Adjudged and Decreed that the plaintiff, Elmore & Stahl, do have and recover of and from the defendant, Missouri Pacific Railroad Company, the total sum of One Thousand Eight Hundred Forty-One and 01/100 Dollars (\$1,841.01), with interest thereon from date of this judgment at the rate of 6% per annum until paid, together with all costs in this behalf expended, for all of which lgt execution issue.

To which judgment and ruling of the Court the defendant duly excepted and gave notice of appeal to the Court of Civil Appeals for the 4th Supreme Judicial District sitting at San Antonio, Texas.

Signed this 2nd day of June, 1961.

Hawthorne Phillips, Judge Presiding.

[fol. 422] [File endorsement omitted]

[fol. 423]

IN THE 107TH JUDICIAL DISTRICT COURT OF
CAMERON COUNTY, TEXAS

No. 37410-A

[Title omitted]

DEFENDANT'S AMENDED MOTION FOR NEW TRIAL
—Filed June 30, 1961

To the Honorable Judge of Said Court:

Now Comes Missouri Pacific Railroad Company, Defendant in the above entitled and numbered cause, with leave of Court, and files this its amended Motion for New Trial, alleging that the judgment of this Court rendered and entered on the 2nd day of June 1961, should be set aside and held for naught, and that Defendant be granted a new trial on each Count of Plaintiff's Petition for the following reasons:

I

The Court erred in failing to grant Defendant's Motion for Judgment on Counts I, II and III.

II.

The Court erred in failing to grant Defendant's Motion to Disregard Findings and for Judgment Non Obstante Veredicto.

III.

The Court erred in failing to grant Defendant's Motion for Remittitur or to reduce the amount of the judgment on Count IV of the Plaintiff's Petition.

IV.

The Court erred in rendering judgment against Defendant on each Count of Plaintiff's Petition.

V.

The judgment is contrary to the law on each Count of Plaintiff's Petition.

VI.

The judgment is not supported by and is contrary to the verdict on each Count of Plaintiff's Petition.

VII.

The judgment is not supported by the verdict and by facts established by undisputed evidence on each Count of Plaintiff's Petition.

VIII.

The jury findings mentioned in Defendant's Motion to Disregard Findings are not supported by sufficient evidence.

IX.

There is no evidence to support the jury findings mentioned in Defendant's Motion to Disregard Findings.

X.

The error of the Court in giving the instruction which it gave in response to the question propounded by the jury

to the Court during the deliberations of the jury; said question particularly relating to Special Issue No. 4 of the Court's Charge.

XI.

The error of the Court in failing to grant Defendant's Motion for Directed Verdict and Judgment in its favor on each Count of Plaintiff's Petition at the close of Plaintiff's direct case.

[fol. 425]

XII.

The error of the Court in failing to grant Defendant's Motion for Directed Verdict and Judgment on each Count of Plaintiff's Petition, at the close of all the evidence and after both sides had closed.

XIII.

The error of the Court in granting Plaintiff's Motion for Judgment on each count of Plaintiff's Petition.

XIV.

The misconduct of the jury during its deliberations upon the verdict in this case.

XV.

The error of the Court in rendering Judgment for Plaintiff under a partnership name without identification of the partners who own said partnership.

Wherefore, Premises, Considered, Defendant prays that the said Judgment be set aside and that Defendant be granted a new trial herein, and for such other and further relief as may be proper in the premises.

Missouri Pacific Railroad Company, Defendant, By:
Sharpe and Hardy, its Attorneys, By: T. Gilbert
Sharpe, of Counsel, P.O. Box 767, Brownsville,
Texas.

[File endorsement omitted]

[fol. 426]

[File endorsement omitted]

IN THE 107TH JUDICIAL DISTRICT COURT OF
CAMERON COUNTY, TEXAS

No. 37410-A

ELMORE & STAHL

VS.

MISSOURI PACIFIC RAILROAD COMPANY

ORDER OVERRULING DEFENDANT'S AMENDED MOTION FOR
NEW TRIAL—August 7, 1961.

On the 25th day of July, 1961, came on to be heard the Defendant's Amended Motion for New Trial in the above entitled and numbered cause; and it appearing to the Court that the said Motion has been duly and timely filed and was duly presented to the Court on July 25, 1961, and the decision of such motion was taken under advisement by the Court; and the Court after considering the said Amended Motion for New Trial, the pleadings, evidence and argument of counsel, is of the opinion on this the 7th day of August, 1961, that the said motion should be overruled.

It Is Accordingly Ordered, Adjudged and Decreed by the Court that the Amended Motion for New Trial of Defendant, Missouri Pacific Railroad Company, be, and the same is overruled, to which ruling and order of the Court the Defendant then and there in open court duly excepted.

Signed for Entry this 7th day of August, 1961.

Hawthorne Phillips, Judge Presiding.

[fol. 427]

[File endorsement omitted]

IN THE 107TH JUDICIAL DISTRICT COURT OF
CAMERON COUNTY, TEXAS

No. 37410-A

[Title omitted]

NOTICE OF APPEAL—Filed August 16, 1961

Now comes Missouri Pacific Railroad Company, the Defendant in the above entitled and numbered cause, and gives notice that it desires appeal to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas from the Judgment of said Court rendered in said cause on the 2nd day of June, A.D. 1961, and from the Order of said Court overruling Defendant's Amended Motion for a New Trial in this cause rendered and entered on the 7th day of August, A.D. 1961.

Missouri Pacific Railroad Company, Defendant,
Sharpe and Hardy, Its Attorneys, By: T. Gilbert
Sharpe, Of Counsel.

[fol. 427a] [File endorsement omitted]

[fol. 428]

IN THE COURT OF CIVIL APPEALS
FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS
SITTING AT SAN ANTONIO, TEXAS
Number 13,937

MISSOURI PACIFIC RAILROAD COMPANY, Appellant.

v.

ELMORE & STAHL, Appellee.

Appeal from the District Court of Cameron County, Texas,
107th Judicial District of Texas

APPELLANT'S MOTION FOR REHEARING, INCLUDING MOTION
FOR FINDINGS OF FACT & CONCLUSIONS OF LAW
—Filed July 11, 1962

To Said Honorable Court:

Now comes Appellant in the above entitled and numbered cause and respectfully moves the Court to set aside the judgment of this Court, as well as the opinion therein, rendered on the 27th day of June, 1962, to the extent that the judgment of the trial court was affirmed, and to grant it a rehearing and reverse said trial court judgment for the following reasons:

SECTION ONE

I

The Court of Civil Appeals erred in overruling and in not sustaining Appellant's Point Number One (a), reading as follows:

[fol. 429] "(a) The jury finding on Special Issue Number Three establishing that the carriers performed

without negligence the transportation services as provided by the terms of the bill of lading and as instructed by the shipper and in a reasonably prudent manner as to matters not covered by the bill of lading or the shipper's instructions, constituted a complete defense where the shipper relied upon a prima facie case, and the carrier was not further required to prove the specific cause of the loss."

II

The Court of Civil Appeals erred in overruling and in not sustaining Appellant's Point Number One (b), reading as follows:

- "(b) The responsibility assumed by a carrier of perishables is fixed by the agreement contained in the bill of lading in accordance with published tariffs and regulations, which are binding upon the shipper and carrier and may not be waived or varied; the tariff provisions have the force of law and constitute a part of the contract between the shipper and carrier, and the effect of same is to limit and define the contractual undertaking of the carrier to carrying out the shipper's instructions and performance of transportation services without negligence."

III

The Court of Civil Appeals erred in overruling and in not sustaining Appellant's Point Number One (c), reading as follows:

- "(c) The correct rule applicable to shipments of perishables is the same as that involving shipments of livestock, that is, the carrier is exonerated from liability upon showing compliance with the shipper's instructions and performance without negligence of transportation services; and the carrier is not required to additionally prove the cause of the shipper's loss or damage."

[fol. 430]

IV

The Court of Civil Appeals erred in overruling and in not sustaining Appellant's Point Number One (d), reading as follows:

- "(d) At common law, the carrier was under no duty to furnish special protective services such as refrigerator cars, icing or ventilation, and any duty, obligation or liability of the carrier concerning such matters depended upon the agreement between the shipper and the carrier and was entirely distinct from and could not be based upon its general liability as a common carrier."

V

The Court of Civil Appeals erred in overruling and in not sustaining Appellant's Point Number Two (a), reading as follows:

- "(a) There was no evidence, or, at least the evidence was insufficient, to establish the condition, particularly the good condition, of the honeydew melons at origin."

VI

The Court of Civil Appeals erred in overruling and in not sustaining Appellant's Point Number Two (b), reading as follows:

- "(b) There was no evidence, or, at least the evidence was insufficient, to establish the market value of the commodity at destination, even if the shipment had arrived without any damage; and there is not a sufficient basis for ascertainment of damages if appellee is entitled to recover the same."

VII

The Court of Civil Appeals erred in overruling and in not sustaining Appellant's Point Number Four (a), reading as follows:

- “(a) There was no evidence, or, at least the evidence was insufficient, to establish the market value of the commodity at destination, even if the shipment had arrived without damage; and there is not a sufficient basis for ascertainment of damages, if appellee is entitled to same.”

VIII

The Court of Civil Appeals erred in overruling and in not sustaining Appellant's Point Number Four (b), reading as follows:

- “(b) The jury award is excessive.”

IX

The Court of Civil Appeals erred in holding, in connection with Count I, “under the above findings the carrier is liable unless it is able to show that the loss was due to one or more of the excepted causes, namely, (1) an act of God, (2) the public enemy, (3) the inherent nature or the qualities of the goods, or (4) the act or fault of the owner or shipper.”

X

The Court of Civil Appeals erred in holding that, in connection with Count I, the authorities relied upon by Appellant are not in point under the facts of this case.

XI

The Court of Civil Appeals erred in holding that “Appellant's first point of error, which is applicable to Count I of the petition, is to the effect that the finding of the jury, that the carrier performed the transportation services ordered by the shipper, without negligence, requires a judgment in its favor”; said statement being an incomplete and inaccurate statement of Appellant's contentions under Point One, and subdivisions (a), (b), (c) and (d) thereof.

[fol. 432]

XII

The Court of Civil Appeals erred, in connection with Count I of the case, in holding the jury found, in part, that "the worsened condition at destination was not caused solely by the shipper's instructions".

XIII

The Court of Civil Appeals erred in holding that, as to Count I, "Appellant made no attempt to show that the loss was due to one or more of the four excepted causes."

XIV

The Court of Civil Appeals erred in deciding Count I of this case contrary to federal law, particularly the Interstate Commerce Act, and the decisions of the federal courts in connection therewith.

XV

The Court of Civil Appeals erred in holding that, in connection with Count I, the trial court properly rendered judgment for Appellee on Count I for the sum of Four Hundred Ninety-six and 25/100 Dollars (\$496.25) together with interest from June 48, 1958.

XVI

The Court of Civil Appeals erred in affirming the judgment of the trial court as to Count I of this case.

XVII

The Court of Civil Appeals erred in affirming the judgment of the trial court as to Count II of this case.

XVIII

The Court of Civil Appeals erred in affirming the judgment of the trial court as to Count IV of this case.

[fol. 433]

SECTION TWO

Motion for Findings and Conclusions

Appellant respectfully requests this Honorable Court to make findings of fact and conclusions of law in connection with the material issues involved in this case as follows:

Count One

(Point One, Appellant's Brief)

I

The jury found in connection with Count I, Special Issue Number 3 (TR 18) as follows:

"Do you find from a preponderance of the evidence that as to the honeydew melons in Car ART 35042 the defendant, and its connecting carriers, performed without negligence the transportation services as provided by the terms and conditions of the bill of lading and as instructed by the plaintiff and in a reasonably prudent manner as to matters not covered by the bill of lading or the plaintiff's instructions?

Answer "yes" or "no".

We, the jury, answer: Yes."

II

The jury found in connection with Count I, Special Issue Number 4, as follows: (TR 18-19).

"Do you find from a preponderance of the evidence that the arrival of honeydew melons in Car ART 35042, in a worsened condition, if you have so found in answer to Special Issue No. 2, was not in any part caused by the failure of the defendant carrier and its connecting carriers to comply with the instructions of the shipper [fol. 434] and furnish all services provided by the terms and conditions of the bill of lading issued on said Car ART 35042?

Answer "It was not due to the failure of the carrier" or "no".

We, the jury, answer: It was not due to the failure of the carrier."

III

Rules 130 and 135 of the Perishable Protective Tariff No. 17, admitted in evidence herein (SF Vol. 2) are part of the contract between the shipper and the carriers in this case and are binding upon them.

IV

The responsibility of a carrier of perishables is fixed by the agreement contained in the bill of lading in accordance with perishable tariffs, including the said Rules 130 and 135 of the Perishable Protective Tariff.

V

The effect of the said Perishable Protective Tariff, and particularly Rules 130 and 135 thereof, when considered with the bill of lading is to limit and define the contractual undertaking of the carrier to carrying out the shipper's instructions and performance of transportation services without negligence.

VI

The jury finding on Special Issue Number Three establishing that the carriers performed without negligence the transportation services as provided by the terms of the bill [fol. 435] of lading and as instructed by the shipper and in a reasonably prudent manner as to matters not covered by the bill of lading or the shipper's instructions, constituted a complete defense where the shipper relied upon a prima facie case, and the carrier was not further required to prove the specific cause of the loss, or that the loss was due to (1) an act of God, (2) the public enemy, (3) the inherent nature or qualities of the goods, or (4) the act or fault of the shipper or owner.

VII

The correct rule applicable to shipments of perishables is the same as that involving shipments of livestock, that is, the carrier is exonerated from liability upon showing compliance with the shipper's instructions and performance

without negligence of transportation services; and the carrier is not required to additionally prove the cause of the shipper's loss or damage.

—VIII

At common law, the carrier was under no duty to furnish special protective services such as refrigerator cars, icing or ventilation, and any duty, obligation or liability of the carrier concerning such matters depended upon the agreement between the shipper and the carrier and was entirely distinct from and could not be based upon its general liability as a common carrier.

Count Four

(Point Four, Appellant's Brief)

I

No market quotations were offered in evidence showing the market value of the peppers involved at the destination point.

II

The only testimony relating to market value of the peppers at destination was opinion evidence given by Mr. Ed Baker, Appellee's office manager.

III

Mr. Ed Baker did not see the peppers involved either at origin or destination.

IV

Mr. Ed Baker testified that he could not give an opinion as to what U.S. #1 peppers should have brought at destination because he did not know what the market was at that time at Indianapolis (SF 84).

V

The testimony ultimately given by Mr. Ed Baker as to what in his opinion the peppers should have brought at

Indianapolis was based solely upon the account of sales showing what the peppers in question sold for. (SF 85-86)

VI

The account of sales in this case, showing the amounts for which the peppers were sold at destination is incompetent to establish the reasonable cash market value on the date of its arrival at destination.

VII

The opinion evidence of Mr. Ed Baker based solely upon the price received for the peppers in question was inadmissible and not sufficient to establish market value of said peppers at destination.

VIII

There is no evidence to support the jury finding on Count IV, Special Issue Number 9 (TR 31).

[fol. 437]

IX

The Trial Court should have disregarded the answer of the jury to Count IV, Special Issue Number 9 (TR 31) in accordance with Appellant's motion requesting such action. (TR 37)

In connection with Section Two of this Motion, if this Honorable Court is not in agreement with the above suggested findings and conclusions, then Appellant respectfully requests of this Court to make the findings and conclusions which the Court deems proper relating to the same subject matter.

Wherefore, premises considered, Appellant prays that upon consideration of this Motion that this Honorable Court grant a re-hearing herein and that the former opinion and judgment of this Court be set aside and that the judgment of the Trial Court on Counts I, II and IV of the case be reversed and rendered in favor of Appellant or in any event that the case be remanded for new trial on such counts; and that the Court make the findings and conclu-

sions requested in Section Two of this Motion, and for such other and further relief as may be proper in the premises.

Missouri Pacific Railroad Company, Appellant.
Sharpe and Hardy, Its Attorneys, By: T. Gilbert

Sharpe and Hardy, Post Office Box 767, Brownsville, Texas.

Hutcheson, Taliaferro & Hutcheson, 1720 Esperson Building, Houston, Texas, Of Counsel.

[fol. 438] Certificate of mailing (omitted in printing).

[fol. 439]

IN THE COURT OF CIVIL APPEALS FOR THE
FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS

No. 13,937

MISSOURI PACIFIC RAILROAD COMPANY, Appellant,

vs.

ELMORE & STAHL, Appellee.

APPELLEE'S MOTION FOR REHEARING—Filed July 12, 1962

To Said Honorable Court:

Now comes Appellee in the above entitled and numbered cause, and respectfully moves the Court to set aside that portion of its judgment, rendered on the 27th day of June, 1962, which reversed and rendered the judgment of the trial Court as to Count III, and to grant Appellee a rehearing and to affirm said judgment as to Count III or, in the alternative, that the judgment as to Count III be remanded for a new trial and therefor says:

I.

The Court of Civil Appeals erred in holding that the jury's answer to Special Issue No. 1, on Count III, precluded a recovery by shipper.

II.

The Court of Civil Appeals erred in reversing and rendering the judgment of the trial Court because the findings of the jury would, at most warrant that the count be remanded for a new trial.

III.

The Court of Civil Appeals erred in taxing one-fourth of the court costs against Appellee.

Appellee respectfully prays that this Motion be granted and that the judgment of the court be in all things affirmed, or in the alternative, that Count III be reversed and remanded for a new trial.

North, Blackmon & White, By John C. North, Jr.,
419 North Tancahua Street, P. O. Box 2087, Corpus
Christi, Texas, Attorneys for Appellee.

[fol. 439a]

[File endorsement omitted]

[fol. 440]

IN THE COURT OF CIVIL APPEALS FOR THE
FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS,
SAN ANTONIO

No. 13937

MISSOURI PACIFIC RAILROAD COMPANY, Appellant,

v.

ELMORE & STAHL, Appellee.

Appeal from Cameron County.

OPINION ON MOTION FOR REHEARING—September 12, 1962

Our original opinion, filed June 27, 1962, is withdrawn and this opinion substituted in its place.

This suit was instituted by Elmore & Stahl as shipper against Missouri Pacific Railroad Company as carrier,

for alleged damages to four shipments, three of which were of honeydew melons originating at Rio Grande City, Texas, and one of green peppers originating at Pharr, Texas; with destination points of the melons at Chicago, Illinois, and Boston, Massachusetts, and of the green peppers at Indianapolis, Indiana.

The trial was to a jury and resulted in judgment in favor of plaintiff on all four counts contained in the petition, from which judgment Missouri Pacific Railroad Company has prosecuted this appeal.

Appellee's petition contained four separate counts, and each of these counts, in effect, is a separate lawsuit. The first count relates to 640 crates of honeydew melons, loaded in Car ART 35042; the second relates to 640 crates of honey dew melons, loaded in Car ART 33450; the third relates to 560 crates of honeydew melons, loaded in Car ART 51395; and Count IV relates to 700 baskets of green peppers, loaded in Car ART 52223.

The cause was submitted to the jury upon nine special issues as to each count in the petition, and these issues are very similar as to each of the four counts. They vary only as to the peculiar facts of each count.

Appellant's Point Number One is as follows:

"Judgment should have been rendered in favor of the Carrier on Count I of the petition because:

- (a) The jury finding on Special Issue Number Three [fol. 441] establishing that the carriers performed without negligence the transportation services as provided by the terms of the bill of lading and as instructed by the shipper and in a reasonably prudent manner as to matters not covered by the bill of lading or the shipper's instructions, constituted a complete defense where the shipper relied upon a prima facie case, and the carrier was not further required to prove the specific cause of the loss.
- (b) The responsibility assumed by a carrier of perishables is fixed by the agreement contained in the bill of lading in accordance with published tariffs and regulations, which are binding upon the

shipper and carrier and may not be waived or varied; the tariff provisions have the force of law and constitute part of the contract between the shipper and carrier, and the effect of same is to limit and define the contractual undertaking of the carrier to carrying out the shipper's instructions and performance of transportation services without negligence.

- (c) The correct rule applicable to shipments of perishables is the same as that involving shipments of livestock, that is, the carrier is exonerated from liability upon showing compliance with the shipper's instructions and performance without negligence of transportation services; and the carrier is not required to additionally prove the cause of the shipper's loss or damage.
- (d) At common law, the carrier was under no duty to furnish special protective services such as refrigerator cars, icing or ventilation, and any duty, obligation or liability of the carrier concerning such matters depended upon the agreement between the shipper and the carrier and was entirely distinct from and could not be based upon its general liability as a common carrier."

The jury found, in answer to Special Issue No. 1, that the honeydew melons referred to in Court I were in such [fol. 442] condition at the time the bill of lading was signed that, based upon the orders given by the shipper to the carrier for their transportation, and the reasonable performance of those orders by the carrier, they would have been reasonably expected to arrive at destination in good merchantable condition.

In answer to Special Issue No. 2, the jury found that such melons were in worse condition than would reasonably have been anticipated, based upon the condition in which they were at the time the bill of lading was signed, the orders given by the shipper to the carrier for their transportation and reasonable performance of those orders by the carrier.

Under the provisions of the Interstate Commerce Act, 49 U.S.C.A. § 20 (11), which provides in part as follows:

"Any common carrier, railroad, * * * receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State * * * shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered * * *."

and under the evidence and findings of the jury, the shipper made out a prima facie case of liability against the carrier. 13 C.J.S. 131, § 71; *Panhandle & S. F. Ry. Co. v. Trautmann Bros.*, 341 S.W. 2d 504; *Missouri-Kansas-Texas R. Co. v. Noble*, 271 S.W. 2d 146; *Rogers v. Crespi & Co.*, 259 S.W. 2d 928; *Railway Exp. Agency v. Hueber*, 191 S.W. 2d 710; *Panhandle & S.F. R. Co. v. Wilson*, 135 S.W. 2d 1062.

It is the contention of the shipper that the carrier can only defend against this prima facie cause of action by showing that the damages were due to one or more of the excepted causes at common law; viz., (1) an act of God, (2) the public enemy, (3) the act of the shipper, (4) the inherent nature of the goods themselves.

The jury found, in answer to Special Issue No. 3, that as to the honeydew melons described in Count I, the carrier performed without negligence the transportation services as provided by the terms and conditions of the bill of lading [fol. 448] and as instructed by the shipper and in a reasonably prudent manner as to matters not covered by the bill of lading or the shipper's instructions.

In answer to Special Issue No. 4, the jury found that as to the honeydew melons described in Count I, the worsened condition on arrival was not caused by the failure of the carrier to comply with the instructions of the shipper and furnish all services provided by the terms and conditions of the bill of lading.

The jury further found, in answer to Special Issue No. 5, that the worsened condition of the melons on arrival was not in any part caused by the failure of the carrier to transport and care for the melons in a reasonably prudent manner as to all matters not covered by shipper's instructions and the bill of lading:

In answer to Special Issue No. 6, the jury found that the worsened condition of the honeydew melons referred to in Count I, at the time of their delivery at destination, was not due solely to an inherent vice existing at the time the melons were received by the carrier at Rio Grande City, Texas:

The jury further found, in answer to Special Issue No. 7, that the worsened condition of the melons at destination was not caused solely by the carrier carrying out the instructions given by the shipper to the carrier for handling this shipment.

In answer to Special Issues Nos. 8 and 9, the jury established the loss in market value of the melons due to the worsened condition at destination.

It is the contention of appellant carrier that the jury's answers to the Special Issues show that the carrier carried out the instructions of the shipper and was not otherwise negligent, and that this is a complete defense to the prima facie case established by the shipper. While it is the contention of appellee shipper that the only defense to the prima facie cause of action established by it is to show that the loss was due to one of the excepted causes set out above.

It is conceded by the parties that where an interstate shipment is involved, the liability of the carrier and the [fol. 444] measure of damages are determined by the Interstate Commerce Act and the decisions of the Courts of the United States, construing it. See *Missouri Pacific Railroad Co. v. Duncan*, 353 S.W. 2d 315; *Missouri-Kansas-Texas R. Co. v. Noble*, supra.

There are a great many authorities discussing the question here presented, and we are of the opinion that, by the great weight of authorities, the contention of the appellee shipper is sustained. *Panhandle & S.F. Ry. Co. v. Trautmann Bros.*, 341 S.W. 2d 504; *Missouri Pac. R. Co.*

v. Trautmann Bros., 301 S.W. 2d 240; Thompson v. Bob Tankersley Produce Co., 289 S.W. 2d 840; Thompson v. A. J. Tebbe & Sons Co., 341 S.W. 2d 627; Schnell v. The Vallescura, 79 L. ed. 373, 293 U.S. 296, 307; Lehigh Valley R. Co. v. State of Russia, 21 F. 2d 396; Compares de Vapores Inseo S.A. v. Missouri Pac. R. Co., 232 F. 2d 657; Reider v. Thompson, 116 F. Supp. 279; Secretary of Agriculture v. United States, 100 L. ed. 173, 350 U.S. 160; Yeckes-Eichenbaum, Inc. v. Texas Mexican Ry. Co., 264 F. 2d 791, cert. den., 4 L. ed. 2d 70; California Packing Corp. v. The Empire State, 180 Fed. Supp. 19; Southern-Plaza Empress, Inc. v. Neal Nerville, Jr., 233 F. 2d 504; U. S. v. Mississippi Valley Barge Line Co., 285 F. 2d 381; California Packing Corp. v. States Marine Corp. of Del., 187 F. Supp. 540; Interstate Commerce Act, Title 49 U.S.C.A., § 20 (11); 13 C.J.S. p. 131, § 71, p. 151, § 79. Tariff Rules Nos. 130 and 135, in no way affect the rules laid down in the above cited authorities. We refuse to follow Southern Pacific Co. v. Itule, 74 P. 2d 38, 115 A.L.R. 1268, wherein it is held that the carrier's liability with relation to the transportation of vegetables is the same as for livestock, because such holding is contrary to the above cited cases.

This brings us to a consideration of Count II of appellee's petition. Appellant's Point Number Two is as follows:

"Judgment should have been rendered in favor of the carrier on Count II of the petition because:

(a) There was no evidence, or, at least the evidence was insufficient, to establish the condition, particularly the good condition, of the honey dew melons at origin.

[fol. 445] (b) There was no evidence, or, at least the evidence was insufficient, to establish the market value of the commodity at destination, even if the shipment had arrived without any damage; and there is not a sufficient basis for ascertainment of damages if appellee is entitled to recover the same."

We sustain this point. The evidence is insufficient to support the finding of the jury that the melons were in good

condition at the point of origin. The shipper relied upon the recital in the bill of lading to the effect that the melons were in apparent good condition, and the testimony of John Fillpot. The recital in the bill of lading relates only as to the condition of the outside of the crates, and this rule is not changed even though honeydew melons are so crated that a part of each melon can be seen without opening the crates. *Hoover Motor Express Co. v. U.S.*, 262 F. 2d 832.

John Fillpot did not inspect the melons at point of origin. He was asked the direct question whether he could say that he saw "a single one of the melons involved in this case." He answered, "I cannot." He was in general charge of gassing and cooling the melons, but the man who actually did this work did not testify. There was no other testimony as to the condition of the melons at origin than the general statements by Fillpot. We reverse the judgment of the trial court on Count II.

Appellant's Point Number Three is as follows:

"Judgment should have been rendered in favor of the carrier on Count III of the petition because:

- (a) The jury finding on Special Issue Number One, establishing that the honeydew melons involved were not in good condition at origin, that is, they would not reasonably have been expected to arrive at destination in good merchantable condition, based upon the orders of the shipper and the reasonable performance of same by the carrier, prevented judgment for the shipper, where the shipper relied solely upon a prima facie case."

[fol. 446] The finding of the jury on Special Issue No. 1, on Count III, precluded any recovery by the shipper on Count III. *Missouri Pacific R. Co. v. Trautmann Bros.*, 301 S.W. 2d 240; *Thompson v. Bob Tankersley Produce Co.*, 289 S.W. 2d 840; *Albers Milling Company v. Hauptman*, 95 F. 2d 286.

Appellant's Point Number Four is as follows:

"Judgment should have been rendered in favor of the carrier on County IV of the petition because:

- (a) There was no evidence, or, at least the evidence was insufficient, to establish the market value of the commodity at destination, even if the shipment had arrived without damage; and there is not a sufficient basis for ascertainment of damages, if appellee is entitled to same.
- (b) The jury award is excessive."

We sustain this point. Appellee in attempting to establish the market value of the peppers relied entirely upon the testimony of Ed Baker. There were no United States Department of Agriculture Market Reports introduced in evidence as to the peppers, and there were no other market reports introduced. Baker admitted that he did not know the market price of U. S. No. 1 peppers on January 26, 1958, in Indianapolis. He based his opinion as to the market value of these peppers upon the account of sales showing that some of them sold for the sum of \$4.00 per basket. In the recent case of *Missouri Pacific Railroad Co. v. Duncan*, 353 S.W. 2d 315, the Austin Court, speaking through Associate Justice Richards, had this to say:

"It is a general rule of law that an account of sales alone is incompetent to establish the reasonable cash market value of a shipment in the condition and on the date of its arrival. *Rio Grande & E.P. R. Co. v. T.A. Austin*, supra; *Thompson v. A. J. Tebbe & Sons Co.*, Tex.Civ.App., 241 S.W. 2d 627, 632; *Reider v. Thompson* (U.S.C.A. 5th) 197 F. 2d 158, 160."

Appellee's motion for a rehearing will be overruled, and appellant's motion for a rehearing will be granted in part and overruled in part in keeping with this opinion. [fol. 447] Our judgment heretofore rendered herein is set aside and judgment entered in accordance with this opinion; i.e., the judgment of the trial court is affirmed as to Count I, and reversed and remanded as to Counts II, III and IV. The costs of this appeal are taxed one-fourth against appellant and three-fourths against appellee.

W. O. Murray, Chief Justice.

[fol. 448] [File endorsement omitted]

[fol. 449]

IN THE COURT OF CIVIL APPEALS FOR THE
FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS

No. 13937

MISSOURI PACIFIC RAILROAD COMPANY, Appellant,

vs.

ELMORE & STAHL, Appellees.

Appealed from the 107th District Court of Cameron County.

JUDGMENT—September 12, 1962

The motion of Appellant for Rehearing, filed July 11, 1962, coming on to be heard, and it appearing to the Court that there was error in the judgment of this Court, rendered on June 27, 1962, affirming in part and reversing and rendering in part the judgment of the Court below, it is therefore considered, adjudged and ordered that said motion be, and it is hereby granted in part and overruled in part. The judgment of this Court rendered on June 27, 1962, is set aside and judgment here rendered as follows:

This cause came on to be heard on the transcript of the record, and the same being examined, because it is the opinion of the Court that there was no error in the judgment of the Court below in rendering judgment against appellant on Count One, and in favor of appellee, it is therefore considered, adjudged and ordered that said judgment in that respect be, and it is hereby, affirmed.

But because it is the opinion of the Court that there was error in the judgment of the Court below wherein it rendered judgment on Counts II, III and IV against appellant, it is therefore considered, adjudged and ordered that said judgment in that respect be, and it is hereby reversed and the cause remanded to the Court below for a new trial in accordance with the opinion of this Court.

It is further ordered that Appellant, Missouri Pacific Railroad Company, and surety, Fidelity and Deposit Company of Maryland, pay one-fourth of the costs of this Court, and Appellees, Elmore & Stahl, pay three-fourths of the costs of this Court in this behalf expended and incurred, and this decision be certified below for observance.

[fol. 450]

IN THE COURT OF CIVIL APPEALS FOR THE
FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS
No. 13937

MISSOURI PACIFIC RAILROAD Co., Appellant,

vs.

ELMORE & STAHL, Appellees.

From Cameron County.

ORDERS OVERRULING MOTIONS FOR REHEARING—
October 10th, 1962

The motion of Appellees for rehearing, filed September 26, 1962, coming on to be heard, it is ordered that said motion be, and it is hereby, overruled; that Appellees, Elmore & Stahl, pay all costs of this motion.

No. 13937

From Cameron County.

MISSOURI PACIFIC RAILROAD Co., Appellant,

vs.

ELMORE & STAHL, Appellees.

The second motion of Appellant for Rehearing, including motion for findings of fact and conclusions of law,

filed September 27, 1962, coming on to be heard, it is ordered that said motion be, and it is hereby, overruled; that Appellant, Missouri Pacific Railroad Company, and surety, Fidelity and Deposit Company of Maryland, pay all costs of this motion.

Clérk's Certificate to foregoing papers (omitted in printing).

[fol. 451]

IN THE SUPREME COURT OF TEXAS

No. A-9323

From Cameron County

Fourth District

MISSOURI PACIFIC RAILROAD COMPANY, Petitioner,

v.

ELMORE & STAHL, Respondent.

OPINION—May 15, 1963

On the only question presented by this appeal, we hold that after a shipper of inanimate perishables by common carrier railroad in interstate commerce has made a prima facie case of carrier liability, the carrier may not exonerate itself by showing that all transportation services were performed without negligence but must go further and establish that the loss or damage was caused by one of the four excepted perils recognized at common law.

Elmore & Stahl, respondent, brought this suit against Missouri Pacific Railroad Company, petitioner, to recover for alleged damage to three shipments of honeydew melons and one shipment of green peppers. The petition contains four separate counts, each relating to one of the shipments. Trial was to a jury and resulted in judgment on the verdict in respondent's favor on all four counts. The Court of Civil Appeals affirmed the judgment of the trial court as to

Count I, but reversed such judgment and remanded the cause as to Counts II, III, and IV. 360 S. W. 2d 839.

We are concerned here only with Count I. Respondent sought thereby to recover for damage to 640 crates of honeydew melons shipped in Car ART 35042 from Rio Grande City, Texas, to Chicago, Illinois. In response to the [fol. 452] first three special issues, the jury found: (1) that at the time the bill of lading was signed the melons were in such condition that, based upon the orders given by the shipper to the carrier and the reasonable performance of such orders by the latter, they would have been reasonably expected to arrive at destination in good merchantable condition; (2) that upon arrival at destination the melons were in a worse condition than would reasonably have been anticipated on the basis of their condition at the time the bill of lading was signed, the orders given by the shipper to the carrier, and the reasonable performance of such orders by the carrier; and (3) that petitioner and its connecting carriers performed without negligence the transportation services as provided by the terms and conditions of the bill of lading and as instructed by the plaintiff, and in a reasonably prudent manner as to matters not covered by such bill of lading or instructions. The jury refused to find that the condition of the melons upon arrival in Chicago was due solely to inherent vice or to the carrying out of respondent's instructions for handling the shipment. "Inherent vice" as defined in the charge included "the inherent nature of the commodity which will cause it to deteriorate with a lapse of time."

Under the general common law rule, a shipper of goods by common carrier makes a prima facie case of carrier liability by showing that the shipment was in good condition when delivered to the carrier at place of origin and in damaged condition when delivered by the carrier at destination. The carrier may then escape responsibility for the damage only by showing that it was caused solely by one or more of four excepted perils: (1) an act of God; (2) the public enemy; (3) the fault of the shipper, or (4) the inherent nature of the goods themselves. Where the loss is [fol. 453] not due to one of these specified causes, it is immaterial whether the carrier has exercised due care or was negligent. See *Commodity Credit Corporation v. Nor-*

ton, 3rd Cir., 167 F. 2d 161; 13 C.J.S. Carriers § 71, p. 131. Some courts have held, however, that the general rule does not apply to shipments of livestock, and that the carrier may escape liability for damage thereto by showing the absence of negligence on its part. See *Panhandle & S. F. Ry. Co. v. Wilson*, Tex.Civ.App., 135 S.W.2d 1062 (wr. dis.).

No attack has been made on the jury findings in this case, and petitioner does not say that the damage to the melons was caused by one of the excepted perils mentioned above. It argues that carrier liability for damage to an interstate shipment of inanimate perishables is determined by the rule applicable to livestock, and that it has been exonerated by the jury's finding in response to Special Issue No. 3. Respondent insists and the Court of Civil Appeals held that the case is governed by the general common law rule. The judgment of the trial court was affirmed because petitioner did not bring itself within one of the recognized common law exceptions.

According to American Jurisprudence, no distinction is made in most jurisdictions "as respects the application of the common-law rule of liability for the safe transportation and delivery of inanimate property, on the basis of its nature or character as perishable or nonperishable. In some jurisdictions, however, it is held that the common-law rule of liability as an insurer does not apply in the case of perishable goods and that liability for the loss or injury thereof depends in all cases upon negligence." 9 Am. Jur. Carriers § 693, p. 841. See also Annotation, 115 A.L.R. 1274. Perhaps the leading authority supporting the latter [fol. 454] view is *Southern Pac. Co. v. Itule*, 51 Ariz. 25, 74 P. 2d 38, 115 A.L.R. 1268. The rule there laid down was recognized as sound in *Texas & Pac. Ry. Co. v. Empacadora de Ciudad Juarez*, Tex. Civ. App., 309 S.W.2d 926 (wr. ref. n.r.e.): The parties here agree, however, that the liability of a carrier for damage to an interstate shipment is a matter of Federal law to be determined by the Federal statutes and decisions.

The general common law rule of carrier liability has long been recognized and applied by the Federal courts. See *Galveston Wharf Co. v. Galveston, H. & S.A. Ry. Co.*, 285

U.S. 127, 76 L. Ed. 659, 52 S. Ct. 342; *Commodity Credit Corp. v. Norton*, supra; *Compania de Vapores Inco, S. A. v. Missouri Pacific R. Co.*, 5th Cir., 232 F. 2d 657; *Lehigh Valley R. Co. v. State of Russia*, 2nd Cir., 21 F. 2d 396; *Reider v. Thompson*, 113 F. Supp. 279. In *Schnell v. The Vallescura*, 293 U.S. 296, 79 L. Ed. 373, 55 S. Ct. 194, which was a suit in admiralty to recover for damage resulting from decay of a shipment of onions, the Supreme Court of the United States discussed the rule which requires the carrier to establish that the loss was due to some excepted peril, and said:

"The reason for the rule is apparent. He is a bailee entrusted with the shipper's goods, with respect to the care and safe delivery of which the law imposes upon him an extraordinary duty. Discharge of the duty is peculiarly within his control. All the facts and circumstances upon which he may rely to relieve him of that duty are peculiarly within his knowledge and usually unknown to the shipper. In consequence, the law casts upon him the burden of the loss which he cannot explain or, explaining, bring within the exceptional case in which he is relieved from liability."

Petitioner directs our attention to the provisions of the Carmack Amendment that any common carrier shall be liable "for any loss, damage, or injury . . . caused by it or by any common carrier . . . to which such property may [fol. 455] be delivered." 49 U. S. C. A. § 20(11). This statute does not alter or modify the basic common law rule of carrier liability with which we are here concerned. See *Cincinnati, N.O. & T.P. R. Co. v. Rankin*, 241 U.S. 319, 60 L. Ed. 1022, 36 S. Ct. 555; *Secretary of Agriculture v. United States*, 350 U.S. 162, 100 L. Ed. 173, 76 S. Ct. 244. Petitioner also relies on Rules 130 and 135 of the Perishable Protective Tariff No. 17, which are quoted in the margin,¹ and has cited a number of cases where the courts

¹ "RULE 130—CONDITION OF PERISHABLE GOODS NOT GUARANTEED BY CARRIERS.—Carriers furnishing protective service as provided herein do not undertake to overcome the inherent tendency of perishable goods to deteriorate or decay, but merely to retard such

have said that these rules operate to limit the carrier's liability.

The reasoning of the courts in some cases is obscured by declarations that the carrier is or is not an insurer, and by statements indicating that the shipper, by establishing delivery to the carrier in good condition and receipt at destination in damaged condition, makes out a prima facie case of negligence on the part of the carrier. Where the common law rule is strictly enforced, the carrier is not an insurer with respect to damage caused solely by one of the excepted perils, but its responsibility is similar to that of an insurer in so far as other risks are concerned. And as pointed [fol. 456] out in *Chesapeake & O. Ry. Co. v. Thompson Mfg. Co.*, 270 U.S. 416, 70 L. Ed. 659, 46 S. Ct. 318, the so-called presumption of negligence is not a presumption at all but is a rule of substantive law under which the carrier is liable for failure to transport safely unless the loss or damage is due to one of the specified causes.

As we construe Rules 130 and 135, they simply provide that by furnishing protective services the carrier does not undertake to overcome the inherent tendency of perishable goods to deteriorate or decay, and will not be responsible, in the absence of negligence, for damage due to the fault of the shipper or the inherent nature of the goods themselves. The cases upon which petitioner relies do not hold otherwise. For example, specific acts of negligence were alleged by the plaintiff in *Atlantic Coast Line R. Co. v. Georgia Packing Co.*, 5th Cir., 164 F. 2d 1, and it was held that

deterioration or decay insofar as may be accomplished by reasonable protective service, of the kind and extent requested by the shipper, performed without negligence."

"**RULE 135—LIABILITY OF CARRIERS.**—Property accepted for shipment under the terms and conditions of this tariff will be received and transported subject to such directions, only, and to such election by the shipper respecting the character and incidents of the protective service as are provided for herein. The duty of the carrier is to furnish without negligence reasonable protective service of the kind and extent so directed or elected by the shipper and carriers are not liable for any loss or damage that may occur because of the acts of the shipper or because the directions of the shipper were incomplete, inadequate or ill-conceived."

proof of compliance with the shipper's instructions constituted a defense to the allegations of negligence in the furnishing of protective services. In *Delphi Frosted Foods Corp. v. Illinois Central R. Co.*, 6th Cir., 188 F. 2d 343, the shipper failed to establish that the fruit was in good condition when delivered to the carrier. While the Court of Appeals for the Fifth Circuit has observed that damage resulting from breakage of crates is different from spoilage due to inherent vice, it did not say that the carrier may exonerate itself without establishing that the case falls within the latter exception. See *Yeckes-Eichenbaum, Inc. v. Texas Mexican Ry. Co.*, 5th Cir., 263 F. 2d 791. In considering whether the shipper had shown negligence on the part of the carrier in *Chesapeake & O. Ry. Co. v. Thompson Mfg. Co.*, *supra*, the court was concerned only with the right [fol. 457] of the plaintiff to maintain suit without having given prior written notice of the claim. The applicable statute provided that such notice would not be required if the goods were damaged in transit by carelessness or negligence.

The concluding portion of the opinion in *Trautmann Bros. v. Missouri Pac. R. Co.*, 5th Cir., 312 F. 2d 102, seems to support petitioner's position, but the entire opinion must be read in the light of the trial court's findings. The shipper there prepared the car by using electric fans and thus melted ice which was required for refrigeration. The carrier was not notified of this action, with the result that the ice supply was not replenished, and many of the melons were found to be overripe and spoiled when they were unloaded at destination. Under these circumstances the trier of fact could well conclude, as he did, that the overripe condition of the melons was caused by excepted perils, i.e., the inherent nature of the perishables and the failure of the shipper to notify the carrier of the manner in which the car was prepared. Although the Court of Appeals referred to the *Itule* case in a footnote, its decision appears to be simply another application of the rule, as stated in the opinion, that "so long as the carrier has discharged its duty of reasonable care, it is * * * not liable for damages occasioned solely by the inherent nature, or vice, of the goods themselves" or "for damages caused solely by the acts or directions of the shipper."

The so-called livestock rule is based, at least in part, upon considerations which have no application in the case of inanimate perishables. We know that honeydew melons do not have the propensities of Brahma cattle, and are not likely to bite each other or kick the slats out of crates. [fol. 458] Petitioner apparently recognizes that the rule it urges us to adopt would not be applicable where the carrier had failed to deliver a shipment of perishables, or in case of bruising, crate breakage or damage by fire. It seems to be saying that when the claim is for spoilage or decay, the carrier should have the benefit of a presumption that the damage was due solely to natural deterioration. We do not agree.

Neither the Congress nor the Federal courts have declared that the liability of a common carrier for damage to inanimate perishables may be predicated only upon negligence. The shipment in the present case was made under a Uniform Straight Bill of Lading which, unlike the Uniform Live Stock Contract prescribed by the Interstate Commerce Commission, states that the carrier shall be liable as at common law except as therein provided. The bill of lading then stipulates that the carrier shall not be liable for loss or damage caused by certain excepted perils, but there is no provision exempting it from liability for damage to perishables not caused by its own negligence. From a consideration of the terms of the bill of lading and the general common law rule as recognized and applied by the Federal courts, it seems clear to us that the Court of Civil Appeals properly refused to follow the *Itule* case. A common carrier is not responsible for spoilage or decay which is shown to be due entirely to the inherent nature of the goods, but petitioner has not established that the damage in this case was caused solely by natural deterioration.

The judgment of the Court of Civil Appeals is affirmed.

Ruel C. Walker, Associate Justice.

Opinion delivered: May 15, 1963.

[fol. 459] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 460]

IN THE SUPREME COURT OF TEXAS

AUSTIN

No. A-9323

MISSOURI PACIFIC RAILROAD CO.,

vs.

ELMORE & STAHL.

From Cameron County, Fourth District.

JUDGMENT—May 15, 1963

This cause came on to be heard on writ of error to the Court of Civil Appeals for the Fourth Supreme Judicial District, and the original transcript and transcript showing the proceedings in the Court of Civil Appeals having been duly considered, because it is the opinion of the Court that there was no error in the judgment of the Court of Civil Appeals, as follows:

"The motion of Appellant for Rehearing, filed July 11, 1962, coming on to be heard, and it appearing to the Court that there was error in the judgment of this Court, rendered on June 27, 1962, affirming in part and reversing and rendering in part the judgment of the Court below, it is therefore considered, adjudged and ordered that said motion be, and it is hereby granted in part and overruled in part. The judgment of this Court rendered on June 27, 1962, is set aside and judgment here rendered as follows:

"This cause came on to be heard on the transcript of the record, and same being examined, because it is the opinion of the Court that there was no error in the judgment of the Court below in rendering judgment against appellant on Count One, and in favor of appellee, it is therefore considered, adjudged and ordered that said judgment in that respect be, and it is hereby, affirmed.

"But because it is the opinion of the Court that there was error in the judgment of the Court below wherein it rendered judgment on Counts II, III and IV against appellant, it is therefore considered, adjudged and ordered that said judgment in that respect be, and it is hereby reversed and the cause remanded to the Court below for a new trial in accordance with the opinion of this Court.

"It is further ordered, that Appellant, Missouri Pacific Railroad Company, and surety, Fidelity and Deposit Company of Maryland, pay one-fourth of the costs of this Court, and Appellees, Elmore & Stahl, pay three-fourths of the costs in this Court in this behalf expended and incurred, and that this decision be certified below for observance."

it is, therefore, adjudged, ordered and decreed that the judgment of the Court of Civil Appeals be, and is hereby, affirmed, in accordance with the opinion herein this day delivered.

"It is further ordered that the costs expended and incurred in this cause in the Court of Civil Appeals remain as assessed by the judgment of that Court and that petitioner, Missouri Pacific Railroad Company, and the surety on its cost bond on appeal, Fidelity and Deposit Company of Maryland, pay all costs in this cause expended and incurred in this Court, and that this decision, with a copy of the opinion herein this day delivered, be certified to the District Court of Cameron County, Texas, for observance.

[fol. 461] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 462]

IN THE SUPREME COURT OF TEXAS

AUSTIN

No. A-9323

MISSOURI PACIFIC RAILROAD CO.,

VS.

ELMORE & STAHL.

From Cameron County, Fourth District.

ORDER OVERRULING MOTION FOR REHEARING—June 12, 1963

Motion of petitioner for rehearing, filed in above numbered and entitled cause on May 30, 1963, having been duly considered by the Court, it is ordered that said motion be, and hereby is, overruled.

Clerk's Certificate to foregoing paper (omitted in printing).

[fol: 463]

SUPREME COURT OF THE UNITED STATES

No. 292—October Term, 1963

MISSOURI PACIFIC RAILROAD COMPANY, Petitioner,

VS.

ELMORE & STAHL.

ORDER ALLOWING CERTIORARI—October 14, 1963

The petition herein for a writ of certiorari to the Supreme Court of the State of Texas is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office-Supreme Court, U.S.
FILED

JUL 19 1963

JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1963

No. **292**

MISSOURI PACIFIC RAILROAD COMPANY, *Petitioner*,

v.

ELMORE & STAHL, *Respondent*.

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF TEXAS**

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INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
STATUTE AND REGULATIONS INVOLVED	2
QUESTIONS PRESENTED	3
STATEMENT	3
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	17

APPENDIX

A. Statutes and Regulations	1a
B. Excerpt from Uniform Straight Bill of Lading ..	5a
C. Opinions in Instant Case	6a
D. Judgment of Texas Supreme Court and Order Denying Motion for Rehearing	23a
E. Opinion of Court of Appeals for Fifth Circuit, <i>Trautmann Bros. Co., Inc. v. Missouri Pacific Railroad Co.</i>	26a
F. Conclusions of Law of the District Court in <i>Trautmann Bros. Co. v. Missouri Pacific Railroad Co.</i> ..	30a
G. Opinion of Court of Appeals for Ninth Circuit, <i>Larry's Sandwiches, Inc. v. Pacific Electric Railway Co.</i>	33a
H. Opinion of House of Lords, <i>F. O. Bradley & Sons Limited v. Federal Steam Navigation Co. Ltd.</i>	38a

CITATIONS

CASES:

<i>Adams Express Co. v. Croninger</i> , 226 U.S. 491 (1913) ..	9
<i>Atlantic Coast Line R.R. v. Georgia Packing Co.</i> , 164 F. 2d 1 (5th Cir. 1947)	4, 12, 14
<i>Cassone v. New York, N.H. & H. R.R.</i> , 100 Conn. 262, 123 Atl. 280 (1924)	10

	Page
<i>Chesapeake & O. Ry. v. Gilbert</i> , 83 A. 2d 327 (D.C. Munic. Ct. App. 1951)	10
<i>Chesapeake & O. Ry. v. Martin</i> , 283 U.S. 209 (1931)	6
<i>Coggs v. Bernard</i> , 2 Ld. Raym. 909, 92 Eng. Rep. 107 (Q.B. 1707)	8
<i>Daniels v. Northern Pac. Ry.</i> , 88 Ore. 421, 171 P. 1178 (1918)	10
<i>Delphi Frosted Foods Corp. v. Illinois Cent. R.R.</i> , 89 F. Supp. 55 (W.D. Ky. 1950), aff'd 188 F. 2d 343 (6th Cir. 1951), cert. denied, 342 U.S. 833 (1951)	10, 12, 14
<i>Erie R.R. v. Tompkins</i> , 304 U.S. 64 (1938)	8
<i>F. O. Bradley & Sons, Ltd. v. Federal Steam Navigation Co., Ltd.</i> , 137 Law Times Rep. 266 (House of Lords 1927)	15
<i>Frye v. Railway Express Agency</i> , 41 Tenn. App. 429, 296 S.W. 2d 362 (1955)	10
<i>Gulf States Utilities Co. v. Grubbs</i> , 44 S.W. 2d 1001 (Tex. Civ. App. 1932)	5
<i>Hafer v. St. Louis Southwestern Ry.</i> , 101 Ark. 310, 142 S.W. 176 (1911)	11
<i>Hamilton Foods v. Atchison, Topeka & Santa Fe Ry.</i> , 83 F. Supp. 478 (S.D. Cal. 1948), aff'd, 173 F. 2d 573 (9th Cir. 1949), cert. denied, 337 U.S. 917 (1949)	10, 12
<i>Howe v. Great No. Ry.</i> , 176 Minn. 46, 222 N.W. 290 (1928)	10
<i>Ill. Cent. R.R. v. H. Rouw & Co.</i> , 25 Tenn. App. 475, 159 S.W. 2d 839 (1940)	10
<i>Larry's Sandwiches, Inc. v. Pacific Elec. R.R.</i> , No. 18,265 (9th Cir. June 3, 1963)	11, 12, 14
<i>Missouri Pac. R.R. v. H. Rouw Co.</i> , 202 Ark. 1139, 155 S.W. 2d 693 (1941)	10
<i>Morris v. Texas & N.O.R.R.</i> , 269 S.W. 2d 565 (Tex. Civ. App. 1954)	5
<i>Pennsylvania R.R. v. Greene</i> , 173 F. Supp. 657 (S.D. Ala. 1959)	6
<i>Peyton v. Railway Express Agency</i> , 316 U.S. 350 (1941)	6
<i>Railway Express Agency v. H. Rouw Co.</i> , 197 Ark. 1142, 127 S.W. 2d 251 (1939)	10
<i>Railway Express Agency v. Shull</i> , 224 Ark. 476, 275 S.W. 2d 882 (1955)	10

Page

<i>Secretary of Agriculture v. United States</i> , 350 U.S. 162 (1956)	9, 15
<i>Southern Pac. Co. v. Itule</i> , 51 Ariz. 25, 74 P. 2d 38 (1937)	10, 11
<i>Sugar v. National Transit Corp.</i> , 82 Ohio App. 439, 81 N.E. 2d 609 (1948)	10
<i>Sutton v. Minneapolis & St. L. Ry.</i> , 222 Minn. 233, 23 N.W. 2d 561 (1946)	10
<i>Texas & Pac. Ry. v. Empacadora de Ciudad Juarez</i> , 309 S.W. 2d 926 (Tex. Civ. App. 1957)	10
<i>Trautmann Bros. Co. v. Missouri Pacific R.R.</i> , 312 F. 2d 102 (5th Cir. 1962)	2, 7, 14
<i>United States v. Reading Co.</i> , 289 F. 2d 7 (3d Cir. 1961)	13, 14
<i>W. E. Roche Fruit Co. v. Northern Pac. Ry.</i> , 184 Wash. 695, 52 P. 2d 325 (1935)	10
<i>Watson Bros. Transp. Co. v. Domenico</i> , 118 Colo. 133, 194 P. 2d 323 (1948)	10
<i>Watson Bros. Transp. Co. v. Feinberg Kosher Sausage Co.</i> , 193 F. 2d 283 (8th Cir. 1951)	10
<i>Yeckes-Eichenbaum, Inc. v. Texas Mexican Ry.</i> , 263 F. 2d 791 (5th Cir. 1959), cert. denied, 361 U.S. 827 (1959)	13

STATUTES AND REGULATIONS:

§ 8(2) Australian Sea-Carriage of Goods Act, Statute No. 14 of 1904	15
Perishable Protective Tariff No. 17	4, 12
28 U.S.C. § 1257(3) (1958)	2
49 U.S.C. § 20(11) (1958)	2, 9

MISCELLANEOUS:

Ass'n of American Railroads, Freight Claim Division, Circular No. FCD 1897 (June 24, 1963)	16
Carver, <i>Carriage of Goods by Sea</i> 14 (10th ed. 1957) ..	9
Holmes, <i>The Common Law</i> 201-204 (1881)	8
41B <i>Texas Jurisprudence</i> , p. 780	5

IN THE
Supreme Court of the United States

OCTOBER TERM, 1963

No. _____

MISSOURI PACIFIC RAILROAD COMPANY, *Petitioner*,

v.

ELMORE & STAHL, *Respondent*.

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF TEXAS**

Petitioner, Missouri Pacific Railroad Company, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Texas in the above entitled case.

The writ should issue for two reasons: *First*, a state court has decided a federal question of importance in conflict with a very recent decision by the Court of Appeals for the Fifth Circuit; *Second*, the state court, contrary to the weight of authority and applicable legal principles, has imposed upon interstate carriers an unreasonable degree of responsibility with respect to

decay and spoilage of perishable commodities shipped in interstate commerce.

OPINIONS BELOW

The opinion of the Supreme Court of Texas is reported at 368 S.W. 2d 99, and is reprinted in the Appendix, p. 6a, *infra*. The opinion of the Texas Court of Civil Appeals is reported at 360 S.W. 2d 839 and is reprinted in the Appendix, p. 14a, *infra*. The opinion of the United States Court of Appeals for the Fifth Circuit in the case of *Trautmann Bros. Co. v. Missouri Pacific R.R.*, 312 F. 2d 102 (1962) is reprinted in the Appendix, p. 26a, *infra*.

JURISDICTION

The judgment of the Supreme Court of Texas was entered on May 15, 1963 (App. p. 23a, *infra*). A timely motion for rehearing was overruled on June 12, 1963 (App. p. 25a, *infra*). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3) (1958). The Court below stated that the parties had submitted the case as governed by federal law, and recognizing the applicability of federal law, it decided the case expressly as a federal question. (App. p. 8a, *infra*).

STATUTE AND REGULATIONS INVOLVED

The pertinent Act of Congress is the so-called Carmack Amendment of June 29, 1906, 34 Stat. 595, c. 3591, § 7, as amended, 49 U.S.C. § 20(11) (1958). The statute reads in relevant part:

"Any common carrier . . . receiving property for transportation from a point in one State . . . to a point in another State . . . shall issue a receipt or bill of lading therefor, and shall be liable to the

lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier . . . to which such property may be delivered or over whose line or lines such property may pass . . .”.

The full text of the statute and the pertinent regulations are set forth in the Appendix, p. 1a, *infra*.

QUESTIONS PRESENTED

1. In the case of spoilage or decay of perishable commodities transported by a common carrier in interstate commerce pursuant to a Uniform Straight Bill of Lading, does a jury finding that all transportation services covered by the Bill were performed without negligence and in full compliance with the shipper's instructions, and were performed in a prudent manner as to matters not covered by the Bill or the shipper's instructions, constitute a complete defense under the federal common law applied under the Bill?

2. In the case of spoilage or decay of perishable commodities in transit, once it is found that the interstate common carrier has performed all transportation services with due care, is the carrier entitled to the "inherent vice" exemption from liability provided under the Uniform Bill and at common law?

STATEMENT

Respondent Elmore & Stahl, fruit shippers, brought suit in a Texas state district court against petitioner, a common carrier, to recover damages for the deterioration of an interstate shipment of perishable honeydew melons. Petitioner transported for respondent 640 crates of melons from Rio Grande City, Texas, to Chicago in a refrigerator car under a Uniform Straight

Bill of Lading.¹ The Bill provides, in pertinent part, that the carrier "shall be liable as at common law" for any loss or damage. The Bill states that, "Except in case of negligence of the carrier . . . (and the burden to prove freedom from such negligence shall be on the carrier . . .) the carrier . . . shall not be liable for loss . . . resulting from a defect or vice in the property."²

The melons had deteriorated in transit, and it was undisputed that the deterioration was the result of spoilage and decay. (Statement of Facts, p. 249). In response to special issues submitted to them at trial, a jury found that "defendant, and its connecting carriers, performed without negligence the transportation services as provided by the terms and conditions of the bill of lading and as instructed by the plaintiff and in a reasonably prudent manner as to matters not covered

¹ The carrier undertook to furnish certain protective services requested by the shipper. The shipper, who had a choice of about one hundred different classes of service, elected standard refrigeration to destination (Statement of Facts, p. 195). The responsibility of the carrier with respect to these services is governed by Rules 130 and 135 of Perishable Protective Tariff No. 17 (set out in App. p. 4a, *infra*); as to them there is liability only for "negligent failure reasonably to carry out instructions given by the shipper." *Atlantic Coast Line R.R. v. Georgia Packing Co.*, 164 F. 2d 1, 3 (5th Cir. 1947). See p. 12, *infra*.

The complaint contained four independent counts, each a separate claim based on damage to a different shipment of perishables. The shipment involved in this petition is solely that involved in Count I, which embraced the move of Car ART 35042 from Rio Grande City to Chicago. Entirely different shipments were involved in the other three counts, and as to them a judgment for plaintiff in the trial court was reversed for a new trial by the Court of Civil Appeals and no review was had in the Texas Supreme Court.

² The pertinent provisions of the Bill are set forth in the Appendix at p. 5a.

by the bill of lading or plaintiff's instructions." (Tr. p. 18) The trial court had imposed the burden of proof of this matter on the carrier. Although the case involved perishables which had decayed, the Court nevertheless submitted to the jury as a separate issue the question whether the worsened condition of the melons upon arrival "was due solely to an inherent vice . . . existing at the time the melons were received by the carrier at Rio Grande City, Texas, for transportation." (Tr. p. 19) The jury answered this question in the negative.³

On the basis of the special findings, the trial judge entered judgment for damages against petitioner. This ruling was affirmed on appeal by the Texas Court of Civil Appeals, 360 S. W. 2d 839 (App. p. 14a; see note 1, *supra*).

After granting a writ of error, the Texas Supreme Court affirmed the judgment. Quoting from American Jurisprudence, it determined to apply a rule stated therein that "no distinction" was to be made with respect to the liability of carriers for the transportation of "inanimate property, on the basis of its nature or

³ Under Texas law and practice, the failure of a jury to find the affirmative of a special issue submitted to it does not constitute an affirmative finding to the contrary. See *Morris v. Texas & N.O.R.R.*, 269 S.W. 2d 565, 569, 572 (Tex. Civ. App. 1954); *Gulf States Utilities Co. v. Grubbs*, 44 S.W. 2d 1001, 1002 (Tex. Civ. App. 1932); 41B Texas Jurisprudence, p. 780. Accordingly, the "no" answer of the jury to this question did not even constitute a positive finding that the damage to the melons did not result solely from inherent vice.

The jury found a so-called "prima facie" case for the shipper by finding (Findings 1 & 2, Tr. pp. 17-18), in substance, that the melons were in good condition at the time the Bill of Lading was signed, but in worse condition at the time of their arrival at Chicago than would reasonably have been foreseeable.

character as perishable or nonperishable." (App. p. 8a). It held that the carrier was liable for the spoilage of perishables in transit "as an insurer," although "all transportation services were performed without negligence." (App. p. 6a)⁴

The Court below acknowledged the existence of numerous decisions holding that "the common-law rule of liability as an insurer does not apply in the case of perishable goods," and that liability for spoilage of perishables under such decisions depends on negligence on the part of the carrier (App. p. 8a). The Texas Supreme Court refused, however, to follow these authorities. It was of the view that the carrier was liable for spoilage, even though it proved due care on its part.

REASONS FOR GRANTING THE WRIT

1. The instant case presents a square conflict with respect to a point of federal law⁵ between the decision of the highest court of a state and a very recent decision of a federal court of appeals.

⁴The Court stated that the carrier could exonerate itself by showing that the loss was encompassed by one of four excepted perils recognized at common law (App. p. 7a), but as we argue below the Court took an erroneous view of these exceptions. See pp. 13-14, *infra*.

⁵The Court below recognized that "the liability of a carrier for damage to an interstate shipment is a matter of Federal law to be determined by the Federal statutes and decisions" (App. p. 8a). "The rights and liabilities of the parties are governed by the acts of Congress, the bill of lading, and the tariffs duly filed with the Interstate Commerce Commission. The bill of lading and the tariff have the force of a statute." *Pennsylvania R.R. v. Greene*, 173 F. Supp. 657, 659 (S.D. Ala. 1959). See *Peyton v. Railway Express Agency*, 316 U.S. 350 (1941); *Chesapeake & O. Ry. v. Martin*, 283 U.S. 209, 212-13 (1931).

The Court below ruled that where a claim is asserted by a shipper against a carrier for spoilage and decay of perishables, "the carrier may not exonerate itself by showing that all transportation services were performed without negligence" on its part. (App. p. 6a). On the other hand, the Court of Appeals for the Fifth Circuit ruled only five months earlier, in *Trautmann Bros. Co. v. Missouri Pacific R. R.*, 312 F. 2d 102 (1962), that as to perishables "A common carrier is not absolutely liable for spoilage or physical deterioration during the course of shipment. So long as the carrier has discharged its duty of reasonable care, it is not liable for damage to a shipment caused * * * by the operation of natural laws upon it * * *;" (312 F. 2d at 104; App. pp. 27a-28a).

In sum, the Texas Supreme Court concluded that where a claim is made for spoilage or decay of perishables, proof of due care and faithful compliance with the shipper's instructions does not absolve the carrier, while the Fifth Circuit held precisely the opposite in a case involving exactly the same commodity (honeydew melons), and the same carrier (Missouri Pacific), which originated in a Texas federal district court. It is unnecessary at this late date to dwell upon the anomaly of a judgment favorable to the shipper if suit is brought in a Texas state court, but favorable to the carrier, in precisely the same circumstances, if suit is brought in a federal court sitting in Texas.⁶ Cf. *Erie R. R. v.*

⁶ The Court below acknowledged that "the concluding portion of the opinion in *Trautmann Bros. Co.* . . . seems to support petitioner's position," but it attempted to distinguish the opinion of the Court of Appeals on the theory that the spoilage in the *Trautmann* case resulted from acts of the shipper (App. pp. 11a-12a). The short answer is that this was not the foundation of the opinion by the Court of Appeals. Its decision rested solidly on

Tompkins, 304 U.S. 64, 74-75 (1938). The significance of the conflict is magnified by the fact that Texas and the other states within the Fifth Circuit are important growing centers for perishable agricultural commodities, originating an enormous volume of interstate shipments of fresh fruits and vegetables.

2. The Texas Supreme Court purported to adjudicate the liability, "as at common law," of an interstate carrier for spoilage of an interstate shipment. However, its view of the common law liability of carriers for spoilage and decay of perishable property in transit is wrong in principle and at odds with decisions by numerous courts applying the federal law, and with the leading British Commonwealth decision on this subject.

(a) In early eighteenth century common law cases, it was said that a common carrier was answerable for any loss or damage to goods entrusted to its care except for "acts of God and the enemies of the King." *Coggs v. Bernard*, 2 Ld. Raym. 909; 92 Eng. Rep. 107, 112

the conclusion "that the defendant was not negligent and hence did not contribute to the spoilage" (312 F. 2d at 105; App. p. 29a). Moreover, even the District Court ruling in the *Trautmann Bros.* case, prominently mentioned by the court below, contains no finding that any act of the shipper had caused the spoilage to the melons. The discussion of the shipper's acts in the District Court's decision was solely in terms of whether, given certain acts of the shipper and the carrier's knowledge or lack of knowledge of them, the carrier performed its duties without negligence. The District Court's conclusions of law in the *Trautmann Bros.* case are, like the Court of Appeals' opinion in that case, in conflict with the decision below. (For the convenience of the Court, the District Court's conclusions of law in the *Trautmann Bros.* case are appended to the Court of Appeals' opinion, in the Appendix at p. 30a).

¹ The historical derivation of these two exceptions is traced in Holmes, *The Common Law* 201-204 (1881).

(Q.B. 1707). (Holt, C.J.). Three additional exceptions to the carrier's liability were soon recognized at common law: (i) the fault of the consignor or owner of the goods; (ii) the inherent vice or nature of the commodity; and (iii) an act by governmental authority. *Secretary of Agriculture v. United States*, 350 U.S. 162, 165, n. 9 (1956); Carver, *Carriage of Goods By Sea* 14 (10th ed. 1957). By the early years of the 20th Century, the common law as applied under the Interstate Commerce Act had developed a fundamental allocation of responsibility. As the Court put it in *Adams Express Co. v. Croninger*, 226 U.S. 491, 506 (1913): "The suggestion that an absolute liability exists for every loss, damage, or injury, from any and every cause, would be to make such a carrier an absolute insurer, and liable for unavoidable loss or damage, though due to uncontrollable forces. That this was the intent of Congress is not conceivable. To give such emphasis to the words, 'any loss or damage,' would be to ignore the qualifying words, 'caused by it.'"⁸ In other words, although as to certain matters the carrier is absolutely liable "the common law did not impose a liability unrelated to the carrier's conduct." *Secretary of Agriculture v. United States*, *supra*, at 173 (concurring opinion).

(b) The relatively recent development of long distance transportation of fresh fruits and vegetables on a large scale in interstate commerce has led to the evolution of an appropriate rule governing the carrier's liability as to such property, based on this com-

⁸ The Court in *Croninger* was construing the provisions of Section 20(11) of the Interstate Commerce Act, 49 U.S.C. § 20(11), which provides that the carrier shall be liable "for any loss . . . to such property caused by it . . ."

mon law principle. The principle that the carrier should not be subject to a liability for spoilage "unrelated to the carrier's conduct" is the basis of decisions by numerous courts applying the federal common law. These decisions absolve the carrier of liability for spoilage and decay to perishable commodities, upon proof by the carrier that it has exercised reasonable care and has handled the goods in the manner requested by the shipper.*

As the Arizona Supreme Court stated in so holding in 1937 in a leading and oft-cited case which the Fifth Circuit cited with approval (App. p. 28a), but which the Court below expressly declined to follow (App. p. 8a):

* *Sutton v. Minneapolis & St. L. Ry.*, 222 Minn. 233, 23 N.W. 2d 561 (1946); *Howe v. Great No. Ry.*, 176 Minn. 46, 222 N.W. 290 (1928); *Missouri Pac. R.R. v. H. Rouw Co.*, 202 Ark. 1139, 155 S.W. 2d 693 (1941); *Railway Express Agency v. H. Rouw Co.*, 197 Ark. 1142, 127 S.W. 2d 251 (1939); *Southern Pac. Co. v. Itule*, 51 Ariz. 25, 74 P. 2d 38 (1937); *W. E. Roche Fruit Co. v. Northern Pac. Ry.*, 184 Wash. 695, 52 P. 2d 325 (1935); *Cassone v. New York, N.H. & H. R.R.*, 100 Conn. 262, 123 Atl. 280 (1924); *Daniels v. Northern Pac. Ry.*, 88 Ore. 421, 171 P. 1178 (1918). See also *Watson Bros. Transp. Co. v. Feinberg Kosher Sausage Co.*, 193 F. 2d 283 (8th Cir. 1951); *Delphi Frosted Foods Corp. v. Illinois Cent. R.R.*, 188 F. 2d 343, 346 (6th Cir. 1951), cert. denied, 342 U.S. 833 (1951); *Hamilton Foods v. Atchison, Topeka & Santa Fe Ry.*, 83 F. Supp. 478, 479 (S.D. Cal. 1948), aff'd 173 F. 2d 573 (9th Cir. 1949), cert. denied, 337 U.S. 917 (1949); *Frye v. Railway Express Agency*, 41 Tenn. App. 429, 296 S.W. 2d 362 (1955); *Railway Express Agency v. Shull*, 224 Ark. 476, 275 S.W. 2d 882 (1955); *Chesapeake & O. Ry. v. Gilbert*, 83 A. 2d 327 (D.C. Munic. Ct. App. 1951); *Watson Bros. Transp. Co. v. Domenico*, 118 Colo. 133, 194 P. 2d 323 (1948); *Sugar v. National Translt Corp.*, 82 Ohio App. 439, 443, 81 N.E. 2d 609, 611 (1948); *Ill. Cent. R.R. v. H. Rouw & Co.*, 25 Tenn. App. 475, 159 S.W. 2d 839 (1940); *Texas & Pac. Ry. v. Empacadora de Ciudad Juarez*, 309 S.W. 2d 926 (Tex. Civ. App. 1957).

"It is a notorious fact, of which the courts may well take judicial notice, that all fruits and vegetables of every nature will ultimately decay, although no human agency has approached them after their maturity. The possibility of damages to this class of goods in shipment, without any negligence on the part of the carrier, is, in our opinion, even greater than that of damage to livestock"¹⁰ *Southern Pac. Co. v. Itule*, 51 Ariz. 25, 32-33, 74 P. 2d 38, 41 (1937).

Recently, the Court of Appeals for the Ninth Circuit flatly expressed the rule in *Larry's Sandwiches, Inc. v. Pacific Elec. R. R.*, No. 18,265, June 3, 1963,¹¹ slip opinion, p. 3: "Upon proof of the perishable nature of the goods, the carrier is relieved of its insurer's liability" and the test is negligence.¹² (App., p. 36a).

¹⁰ It is generally recognized that "due to the peculiar nature and propensity of animals, the carrier should not be liable for injury thereto, if it ha[s] provided suitable means of transportation and exercised the degree of care which the nature of the property require[s] . . . [Animals] may be injured, or even killed, by acts arising out of their own inherent nature and unaccompanied by any human agency or negligence." *Southern Pac. Co. v. Itule*, 51 Ariz. 25, 30-31, 74 P. 2d 38, 40-41 (1937); *Hafer v. St. Louis Southwestern Ry.*, 101 Ark. 310, 142 S.W. 176 (1911).

The Court below accepted the livestock rule but stated that the "so-called livestock rule is based, at least in part, upon considerations which have no application in the case of inanimate perishables." (App. p. 12a) On the other hand, the Court in *Itule* indicated that perishable fruits and vegetables present an even more appropriate case for exonerating the carriers from liability (51 Ariz. at 33, 74 P. 2d at 41).

¹¹ This recent decision is reproduced in the Appendix, p. 33a, for the convenience of the Court.

¹² The decision below is in substantial conflict with the *Larry's Sandwiches* decision, and we urge this conflict also as a basis for granting the writ.

(c) Rule 130 of Perishable Protective Tariff No. 17, applicable to the shipment in this case, reflects the common law basis of the carrier's liability for the spoilage of perishable commodities, and makes clear the error committed below. That Tariff provides that "carriers furnishing protective service as provided herein do not undertake to overcome the inherent tendency of perishable goods to deteriorate or decay, but merely to retard such deterioration or decay insofar as may be accomplished by reasonable protective service . . . performed without negligence."

This Tariff clearly adopts the accepted view that at common law the carrier is not liable for the spoilage and decay of perishable commodities absent its negligence. See *Atlantic Coast Line R. R. v. Georgia Packing Co.*, 164 F. 2d 1 (5th Cir. 1947); *Hamilton Foods, Inc. v. Atchison, Topeka & S.F. R. R.*, 83 F. Supp. 478 (S.D. Cal. 1948), *aff'd*, 173 F. 2d 573 (9th Cir. 1949), *cert. denied*, 337 U.S. 917 (1949); *Delphi Frosted Foods Corp. v. Illinois Central R. R.*, 89 F. Supp. 55 (W.D. Ky. 1950), *aff'd*, 188 F. 2d 343 (6th Cir. 1951), *cert. denied*, 342 U.S. 833 (1951); *Larry's Sandwiches, Inc. v. Pacific Elec. R. R.*, *supra*. It would be an absurdity to say that as to spoilage the carrier was liable only for negligence if protective services were requested and furnished, but absolutely liable for spoilage if the shipper did not request such services. Moreover, here again, the decision below is in conflict with the Fifth Circuit's decision in *Trautmann Bros.* which makes it clear that the Perishable Protective Tariff is based on the common law rules as to perishables. See App., p. 28a.

(d) Not only does the liability of the carrier "at common law" not extend to the spoilage¹³ of perishables caused without its fault, but the Bill of Lading recognizes this by providing, in terms, that absent negligence the carrier shall not be accountable for loss or damage "resulting from a defect or vice in the property." (App. p. 5a). Accordingly, under the Bill, "the duty imposed on a carrier in handling perishables is to exercise reasonable care" and the carrier is "not liable for damage occasioned by the inherent vice or nature of the goods in the absence of negligence." *United States v. Reading Co.*, 289 F. 2d 7, 9 (3d Cir. 1961).

The courts below apparently labored under a misapprehension of the meaning of this clause in the Bill. They declined to view the spoilage or decay of perishable commodities as resulting from the "inherent vice or nature of the goods," absent some form of showing by the carrier that this specific shipment of perishable goods was particularly or peculiarly unfit for the journey.¹⁴ This novel view is likewise contrary to the

¹³ The Court below indicated surprise at the petitioner's contention that different rules applied in the case of breakage as distinguished from spoilage of perishables, and that the carrier should be liable in the case of spoilage only where it can not prove its freedom from fault. See App. p. 12a. But this distinction between breakage and spoilage cases is one which is clearly made in the federal common law, as is demonstrated in Judge Hutcheson's opinion in *Yeckes-Eichenbaum, Inc. v. Texas Mexican Ry.*, 263 F. 2d 791, 792, 794 (5th Cir. 1959), *cert. denied*, 361 U.S. 827 (1959).

¹⁴ It was established that the melons had spoiled and decayed; but the Texas Supreme Court, apparently on some theory that only peculiar unfitness to make the journey was covered by the exception clause, commented that "petitioner has not established that the damage in this case was caused solely by natural deterioration." (App. p. 13a). (emphasis original).

established federal law on the matter and again is in flat conflict with the Fifth Circuit's decision in the *Trautmann Bros. case*¹³ and the Ninth Circuit's decision in the *Larry's Sandwiches case*.

The established meaning of the clause is that when damage to perishable goods arises through spoilage or decay, a case of "damage occasioned by the inherent vice or nature of the goods" is presented, and the carrier may exonerate itself by showing its freedom from fault, as petitioner did here. *United States v. Reading Co., supra*; *Trautmann Bros. Co. v. Missouri Pac. R. R., supra*; *Larry's Sandwiches, Inc. v. Pacific Elec. R. R., supra*; *Delphi Frosted Foods Corp. v. Illinois Cent. R. R., supra*; *Atlantic Coast Line R. R. v. Georgia Packing Co., 164 F. 2d 1 (5th Cir. 1947)*. No showing of peculiar or unusual spoilage tendencies in the perishable commodities is demanded. As the Court of Appeals for the Ninth Circuit put it in its recent decision in *Larry's Sandwiches, Inc. v. Pacific Elec. R. R., supra*, in the case of spoilage and decay to "perishable goods, the burden upon the carrier is not to prove that the damage resulted from the inherent vice of the

¹³ In the *Trautmann Bros.* case some evidence had been submitted to the effect that melons grown at Laredo, the place of origination of the shipment involved there, were peculiarly prone to decay. This was contested on appeal, but the Fifth Circuit held the matter irrelevant: "Even if it is true, as appellant contends, that the District Court's finding of inherent vice was based upon improper inferences from general conditions at Laredo, the evidence is nevertheless ample to support the judge's additional finding that the defendant was not negligent and hence did not contribute to the spoilage," (312 F. 2d at 105; App. p. 29a). (Emphasis supplied). In short, once the case is one of spoilage or decay, the question is not whether the spoilage was expectable in some unusual way, but simply whether the carrier's negligence contributed to it.

goods, but to prove its own compliance with the rules of the Tariff and the shipper's instructions." (App. p. 36a).

The established construction of the clause is illumined by the decision of the House of Lords in *F. O. Bradley & Sons, Ltd. v. Federal Steam Navigation Co., Ltd.*, 137 Law Times Rep. 266 (1927);¹⁶ construing provisions of the Australian Sea-Carriage of Goods Act¹⁷ similar to those of the Bill presented here. There, the House of Lords affirmed a judgment in favor of the carrier in a suit for damages for the spoilage of a cargo of apples shipped from Australia to London. It had been found that "there had been no want of care" by the carrier. Construing the "inherent vice" clause, the House of Lords rejected the contention that to avail itself of this exception the carrier must "put a name to the vice or specify some particular inherent quality and distinguish it from all others." (App. p. 52a). As the court put it, it was enough that the apples "decayed not because of the ship or of the sea or of the route, but because they were apples . . ."; accordingly, the court held that the case was within the "inherent vice" clause.¹⁸

¹⁶ Set forth in the Appendix, p. 38a, for the Court's convenience.

¹⁷ "[N]either the ship nor her owner . . . shall be responsible for damage to . . . the goods resulting from . . . the inherent defect, quality, or vice of the goods." § 8(2), Australian Sea-Carriage of Goods Act, Statute No. 14 of 1904.

¹⁸ In fact, it has been common ground, even conceded in the published positions of the representatives of the interests of agricultural shippers, that the spoilage or decay of perishable goods falls within the "inherent vice" exception, and that accordingly as to such spoilage the carrier may obtain exoneration by showing its freedom from fault. See the position of the Secretary of Agriculture, "as representative of the Agricultural Community in the United States" (Brief, pp. 12-13), noted in *Secretary of Agriculture v. United States*, *supra*, at 165 n. 9.

As the Perishable Protective Tariff confirms, the "inherent vice" exception embraces "the inherent tendency of perishable goods to deteriorate or decay." (See p. 12, *supra*). It has never before been intimated that the exception embraced only spoilage or decay of some extraordinary or unusual nature. The Bill certainly does not support such a construction. Accordingly, it was inconsistent with established principles and erroneous for the courts below to proceed on the basis that the exception for damages "resulting from a defect or vice in the property" did not altogether embrace the decay or spoilage of perishable goods not contributed to by any fault on the part of the carrier.

3. The questions presented are of substantial importance. Perishable goods frequently spoil or decay in transit, as is notorious. The matter is accordingly a source of prolific litigation, both in the state and federal courts. In Texas alone, petitioner is presently a defendant in approximately 300 suits involving claims for roughly 900 shipments of perishable fruits and vegetables. Apart from the litigated cases, thousands of claims by shippers of perishable commodities are settled annually on the basis of the parties' views of the applicable law. In 1962, U. S. rail carriers paid a total of \$8,328,470 in satisfaction of claims for carload loss and damage to fresh fruits, melons, and vegetables and frozen fruits and vegetables.¹⁹ It is manifestly important that the law governing the responsibility for spoilage to perishable goods shipped in interstate commerce be authoritatively settled.

¹⁹ Ass'n of American Railroads, Freight Claim Division, Circular No. FCD 1897 (June 24, 1963).

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

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July 1963

INDEX TO APPENDIX

	Page
A. Statutes and Regulations	1a
B. Excerpt from Uniform Straight Bill of Lading	5a
C. Opinions in Instant Case	6a
D. Judgment of Texas Supreme Court and Order Denying Motion for Rehearing	23a
E. Opinion of Court of Appeals for Fifth Circuit, <i>Trautmann Bros. Co., Inc. v. Missouri Pacific Railroad Co.</i>	26a
F. Conclusions of Law of the District Court in <i>Trautmann Bros. Co. v. Missouri Pacific Railroad Co.</i> ...	30a
G. Opinion of Court of Appeals for Ninth Circuit, <i>Larry's Sandwiches, Inc. v. Pacific Electric Railway Co.</i>	33a
H. Opinion of House of Lords, <i>F. O. Bradley & Sons Limited v. Federal Steam Navigation Co. Ltd.</i>	38a

APPENDIX**A. STATUTES AND REGULATIONS**

(i) **Interstate Commerce Act, 49 U.S.C. § 20(11):**

“§ 20, par. (11). Liability of initial and delivering carrier for loss; limitation of liability; notice and filing of claim. Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory, or any common carrier, railroad, or transportation company delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such

common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is declared to be unlawful and void: *Provided*, That if the loss, damage, or injury occurs while the property is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water and by and under the laws and regulations applicable to transportation by water, and the liability of the initial or delivering carrier shall be the same as that of such carrier by water: *Provided, however*, That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary livestock, received for transportation concerning which the carrier shall have been or shall be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section 10 of this title; and any tariff schedule which may be filed with the commission pursuant to such

order shall contain specific reference thereto and may establish rates varying with the value so declared and agreed upon; and the commission is empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would; in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term "ordinary livestock" shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses: *Provided further*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: *Provided further*, That all actions brought under and by virtue of this paragraph against the delivering carrier shall be brought, and may be maintained, if in a district court of the United States, only in a district, and if in a State court, only in a State through or into which the defendant carrier operates a line of railroad: *Provided further*, That it shall be unlawful for any such receiving or delivering common carrier to provide by rule, contract, regulation, or otherwise a shorter period for the filing of claims than nine months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice: *And provided further*, That for the purposes of this paragraph and of paragraph (12) of this section the delivering carrier shall be construed to be the carrier performing the line-haul service nearest to the point of destination and not a carrier performing merely a switching service at the point of destination: *And provided further*, That the liability imposed by this paragraph shall also apply in the case of property reconsigned or diverted in accordance with the applicable tariffs filed as in this chapter provided. Feb. 4, 1887, c. 104, Pt. I, § 20, 24 Stat. 386; June 29, 1906, c. 3591,

§ 7, 34 Stat. 593; Mar. 4, 1915, c. 176, § 1, 38 Stat. 1196; Aug. 9, 1916, c. 301, 39 Stat. 441; Feb. 28, 1920, c. 91, §§ 436-438, 41 Stat. 494; July 3, 1926, c. 761, 44 Stat. 835; Mar. 4, 1927, c. 510, § 3, 44 Stat. 1448; Apr. 23, 1930, c. 208, 46 Stat. 251; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; Sept. 18, 1940, c. 722, Title I, § 13(b), 54 Stat. 919."

(II) Rules 130 and 135 of Perishable Protective Tariff No. 17:

"RULE 130—CONDITION OF PERISHABLE GOODS NOT GUARANTEED BY CARRIERS.—Carriers furnishing protective service as provided herein do not undertake to overcome the inherent tendency of perishable goods to deteriorate or decay, but merely to retard such deterioration or decay insofar as may be accomplished by reasonable protective service, of the kind and extent requested by the shipper, performed without negligence."

"RULE 135—LIABILITY OF CARRIERS.—Property accepted for shipment under the terms and conditions of this tariff will be received and transported subject to such directions, only, and to such election by the shipper respecting the character and incidents of the protective service as are provided for herein. The duty of the carrier is to furnish without negligence reasonable protective service of the kind and extent so directed or elected by the shipper and carriers are not liable for any loss or damage that may occur because of the acts of the shipper or because the directions of the shipper were incomplete, inadequate or ill-conceived."

B. EXCERPT FROM UNIFORM STRAIGHT BILL OF LADING

Sec. 1. (a) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided.

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for natural shrinkage. The carrier's liability shall be that of warehouseman, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of delivery of the property to the party entitled to receive it, has been made. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton, or from riots or strikes.

C. OPINIONS IN INSTANT CASE

(1) Opinion of Supreme Court of Texas:

IN THE SUPREME COURT OF TEXAS

No. A-9323

MISSOURI PACIFIC RAILROAD COMPANY, *Petitioner*,

v.

ELMORE & STAHL, *Respondent*.

From Cameron County—Fourth District

On the only question presented by this appeal, we hold that after a shipper of inanimate perishables by common carrier railroad in interstate commerce has made a prima facie case of carrier liability, the carrier may not exonerate itself by showing that all transportation services were performed without negligence but must go further and establish that the loss or damage was caused by one of the four excepted perils recognized at common law.

Elmore & Stahl, respondent, brought this suit against Missouri Pacific Railroad Company, petitioner, to recover for alleged damage to three shipments of honeydew melons and one shipment of green peppers. The petition contains four separate counts, each relating to one of the shipments. Trial was to a jury and resulted in judgment on the verdict in respondent's favor on all four counts. The Court of Civil Appeals affirmed the judgment of the trial court as to Count I, but reversed such judgment and remanded the cause as to Counts II, III, and IV. 360 S. W. 2d 839.

We are concerned here only with Count I. Respondent sought thereby to recover for damage to 640 crates of honeydew melons shipped in Car ART 35042 from Rio Grande City, Texas, to Chicago, Illinois. In response to the first three special issues, the jury found: (1) that at the time the bill of lading was signed the melons were in

such condition that, based upon the orders given by the shipper to the carrier and the reasonable performance of such orders by the latter, they would have been reasonably expected to arrive at destination in good merchantable condition; (2) that upon arrival at destination the melons were in a worse condition than would reasonably have been anticipated on the basis of their condition at the time the bill of lading was signed, the orders given by the shipper to the carrier, and the reasonable performance of such orders by the carrier; and (3) that petitioner and its connecting carriers performed without negligence the transportation services as provided by the terms and conditions of the bill of lading and as instructed by the plaintiff, and in a reasonably prudent manner as to matters not covered by such bill of lading or instructions. The jury refused to find that the condition of the melons upon arrival in Chicago was due *solely* to inherent vice or to the carrying out of respondent's instructions for handling the shipment. "Inherent vice" as defined in the charge included "the inherent nature of the commodity which will cause it to deteriorate with a lapse of time."

Under the general common law rule, a shipper of goods by common carrier makes a prima facie case of carrier liability by showing that the shipment was in good condition when delivered to the carrier at place of origin and in damaged condition when delivered by the carrier at destination. The carrier may then escape responsibility for the damage only by showing that it was caused solely by one or more of four excepted perils: (1) an act of God; (2) the public enemy; (3) the fault of the shipper, or (4) the inherent nature of the goods themselves. Where the loss is not due to one of these specified causes, it is immaterial whether the carrier has exercised due care or was negligent. See *Commodity Credit Corporation v. Norton*, 3rd Cir., 167 F. 2d 161; 13 C.J.S. Carriers § 71, p. 131. Some courts have held, however, that the general rule does not apply to

shipments of livestock, and that the carrier may escape liability for damage thereto by showing the absence of negligence on its part. See *Pashanle & S. F. Ry. Co. v. Wilson*, Tex. Civ. App., 135 S.W. 2d 1062 (wr. dis.).

No attack has been made on the jury findings in this case, and petitioner does not say that the damage to the melons was caused by one of the excepted perils mentioned above. It argues that carrier liability for damage to an interstate shipment of inanimate perishables is determined by the rule applicable to livestock, and that it has been exonerated by the jury's finding in response to Special Issue No. 3. Respondent insists and the Court of Civil Appeals held that the case is governed by the general common law rule. The judgment of the trial court was affirmed because petitioner did not bring itself within one of the recognized common law exceptions.

According to American Jurisprudence, no distinction is made in most jurisdictions "as respects the application of the common-law rule of liability for the same transportation and delivery of inanimate property, on the basis of its nature or character as perishable or nonperishable. In some jurisdictions, however, it is held that the common-law rule of liability as an insurer does not apply in the case of perishable goods and that liability for the loss or injury thereof depends in all cases upon negligence." 9 Am. Jur. Carriers § 693, p. 841. See also Annotation, 115 A.L.R. 1274. Perhaps the leading authority supporting the latter view is *Southern Pac. Co. v. Itule*, 51 Ariz. 25, 74 P. 2d 38, 115 A.L.R. 1268. The rule there laid down was recognized as sound in *Texas & Pac. Ry. Co. v. Empacadora de Ciudad Juarez*, Tex. Civ. App., 309 S.W. 2d 926 (wr. ref. n.r.e.). The parties here agree, however, that the liability of a carrier for damage to an interstate shipment is a matter of Federal law to be determined by the Federal statutes and decisions.

The general common law rule of carrier liability has long been recognized and applied by the Federal courts. See *Galveston Wharf Co. v. Galveston, H. & S.A. Ry. Co.*, 285 U.S. 127, 76 L. Ed. 659, 52 S. Ct. 342; *Commodity Credit Corp. v. Norton*, *supra*; *Compania de Vapores Insco, S. A. v. Missouri Pacific R. Co.*, 5th Cir., 232 F. 2d 657; *Lehigh Valley R. Co. v. State of Russia*, 2nd Cir., 21 F. 2d 396; *Reider v. Thompson*, 116 F. Supp. 279. In *Schnell v. The Vallescura*, 293 U.S. 296, 79 L. Ed. 373, 55 S. Ct. 194, which was a suit in admiralty to recover for damage resulting from decay of a shipment of onions, the Supreme Court of the United States discussed the rule which requires the carrier to establish that the loss was due to some excepted peril, and said:

"The reason for the rule is apparent. He is a bailee entrusted with the shipper's goods, with respect to the care and safe delivery of which the law imposes upon him an extraordinary duty. Discharge of the duty is peculiarly within his control. All the facts and circumstances upon which he may rely to relieve him of that duty are peculiarly within his knowledge and usually unknown to the shipper. In consequence, the law casts upon him the burden of the loss which he cannot explain or, explaining, bring within the exceptional case in which he is relieved from liability."

Petitioner directs our attention to the provisions of the Carmack Amendment that any common carrier shall be liable "for any loss, damage, or injury * * * caused by it or by any common carrier * * * to which such property may be delivered." 49 U.S.C.A. § 20(11). This statute does not alter or modify the basic common law rule of carrier liability with which we are here concerned. See *Cincinnati, N.O. & T.P. R. Co. v. Rankin*, 241 U.S. 319, 60 L. Ed. 1022, 36 S. Ct. 555; *Secretary of Agriculture v. United States*, 350 U.S. 162, 100 L. Ed. 173, 76 S. Ct. 244. Petitioner also relies on Rules 130 and 135 of the Perishable Protective

Tariff No. 17, which are quoted in the margin,¹ and has cited a number of cases where the courts have said that these rules operate to limit the carrier's liability.

The reasoning of the courts in some cases is obscured by declarations that the carrier is or is not an insurer, and by statements indicating that the shipper, by establishing delivery to the carrier in good condition and receipt at destination in damaged condition, makes out a *prima facie* case of negligence on the part of the carrier. Where the common law rule is strictly enforced, the carrier is not an insurer with respect to damage caused solely by one of the excepted perils, but its responsibility is similar to that of an insurer in so far as other risks are concerned. And as pointed out in *Chesapeake & O. Ry. Co. v. Thompson Mfg. Co.*, 270 U.S. 416, 70 L. Ed. 659, 46 S. Ct. 318, the so-called presumption of negligence is not a presumption at all but is a rule of substantive law under which the carrier is liable for failure to transport safely unless the loss or damage is due to one of the specified causes.

¹ "RULE 130—CONDITION OF PERISHABLE GOODS NOT GUARANTEED BY CARRIERS.—Carriers furnishing protective service as provided herein do not undertake to overcome the inherent tendency of perishable goods to deteriorate or decay, but merely to retard such deterioration or decay insofar as may be accomplished by reasonable protective service, of the kind and extent requested by the shipper, performed without negligence."

"RULE 135—LIABILITY OF CARRIERS.—Property accepted for shipment under the terms and conditions of this tariff will be received and transported subject to such directions, only, and to such election by the shipper respecting the character and incidents of the protective service as are provided for herein. The duty of the carrier is to furnish without negligence reasonable protective service of the kind and extent so directed or elected by the shipper and carriers are not liable for any loss or damage that may occur because of the acts of the shipper or because the directions of the shipper were incomplete, inadequate or ill-conceived."

As we construe Rules 130 and 135, they simply provide that by furnishing protective services the carrier does not undertake to overcome the inherent tendency of perishable goods to deteriorate or decay, and will not be responsible, in the absence of negligence, for damage due to the fault of the shipper or the inherent nature of the goods themselves. The cases upon which petitioner relies do not hold otherwise. For example, specific acts of negligence were alleged by the plaintiff in *Atlantic Coast Line R. Co. v. Georgia Packing Co.*, 5th Cir., 164 F. 2d 1, and it was held that proof of compliance with the shipper's instructions constituted a defense to the allegations of negligence in the furnishing of protective services. In *Delphi Frosted Foods Corp. v. Illinois Central R. Co.*, 6th Cir., 188 F. 2d 343, the shipper failed to establish that the fruit was in good condition when delivered to the carrier. While the Court of Appeals for the Fifth Circuit has observed that damage resulting from breakage of crates is different from spoilage due to inherent vice, it did not say that the carrier may exonerate itself without establishing that the case falls within the latter exception. See *Yeckes-Eichenbaum, Inc. v. Texas Mexican Ry. Co.*, 5th Cir., 263 F. 2d 791. In considering whether the shipper had shown negligence on the part of the carrier in *Chesapeake & O. Ry. Co. v. Thompson Mfg. Co.*, *supra*, the court was concerned only with the right of the plaintiff to maintain suit without having given prior written notice of the claim. The applicable statute provided that such notice would not be required if the goods were damaged in transit by carelessness or negligence.

The concluding portion of the opinion in *Trautmann Bros. v. Missouri Pac. R. Co.*, 5th Cir., 312 F. 2d 102, seems to support petitioner's position, but the entire opinion must be read in the light of the trial court's findings. The shipper there prepared the car by using electric fans and thus melted ice which was required for refrigeration. The carrier was not notified of this action, with the result that the ice supply was not replenished, and many of the melons

were found to be overripe and spoiled when they were unloaded at destination. Under these circumstances the trier of fact could well conclude, as he did, that the overripe condition of the melons was caused by excepted perils, i.e., the inherent nature of the perishables and the failure of the shipper to notify the carrier of the manner in which the car was prepared. Although the Court of Appeals referred to the Itule case in a footnote, its decision appears to be simply another application of the rule, as stated in the opinion, that "so long as the carrier has discharged its duty of reasonable care, it is * * * not liable for damages occasioned solely by the inherent nature, or vice, of the goods themselves" or "for damages caused solely by the acts or directions of the shipper."

The so-called livestock rule is based, at least in part, upon considerations which have no application in the case of inanimate perishables. We know that honeydew melons do not have the propensities of Brahma cattle, and are not likely to bite each other or kick the slats out of crates. Petitioner apparently recognizes that the rule it urges us to adopt would not be applicable where the carrier had failed to deliver a shipment of perishables, or in case of bruising, crate breakage or damage by fire. It seems to be saying that when the claim is for spoilage or decay, the carrier should have the benefit of a presumption that the damage was due solely to natural deterioration. We do not agree.

Neither the Congress nor the Federal courts have declared that the liability of a common carrier for damage to inanimate perishables may be predicated only upon negligence. The shipment in the present case was made under a Uniform Straight Bill of Lading which, unlike the Uniform Live Stock Contract prescribed by the Interstate Commerce Commission, states that the carrier shall be liable as at common law except as therein provided. The bill of lading then stipulates that the carrier shall not be liable for

loss or damage caused by certain excepted perils, but there is no provision exempting it from liability for damage to perishables not caused by its own negligence. From a consideration of the terms of the bill of lading and the general common law rule as recognized and applied by the Federal courts, it seems clear to us that the Court of Civil Appeals properly refused to follow the *Itule* case. A common carrier is not responsible for spoilage or decay which is shown to be due entirely to the inherent nature of the goods, but petitioner has not established that the damage in this case was caused *solely by natural deterioration*.

The judgment of the Court of Civil Appeals is affirmed.

RUEL C. WALKER
Associate Justice

Opinion delivered:
May 15, 1963

(ii) Opinion of Texas Court of Civil Appeals:

No. 13937

MISSOURI PACIFIC RAILROAD COMPANY, *Appellant*,

v.

ELMORE & STAHL, *Appellee*.Appeal from Cameron County
On Motion for Rehearing

Our original opinion, filed June 27, 1962, is withdrawn and this opinion substituted in its place.

This suit was instituted by Elmore & Stahl as shipper against Missouri Pacific Railroad Company as carrier, for alleged damages to four shipments, three of which were of honeydew melons originating at Rio Grande City, Texas, and one of green peppers originating at Pharr, Texas, with destination points of the melons at Chicago, Illinois, and Boston, Massachusetts, and of the green peppers at Indianapolis, Indiana.

The trial was to a jury and resulted in judgment in favor of plaintiff on all four counts contained in the petition, from which judgment Missouri Pacific Railroad Company has prosecuted this appeal.

Appellee's petition contained four separate counts, and each of these counts, in effect, is a separate lawsuit. The first count relates to 640 crates of honeydew melons, loaded in Car ART 35042; the second relates to 640 crates of honeydew melons, loaded in Car ART 33450; the third relates to 560 crates of honeydew melons, loaded in Car ART 51395; and Count IV relates to 700 baskets of green peppers, loaded in Car ART 52223.

The cause was submitted to the jury upon nine special issues as to each count in the petition, and these issues are very similar as to each of the four counts. They vary only as to the peculiar facts of each count.

Appellant's Point Number One is as follows:

"Judgment should have been rendered in favor of the Carrier on Count I of the petition because:

- (a) The jury finding on Special Issue Number Three establishing that the carriers performed without negligence the transportation services as provided by the terms of the bill of lading and as instructed by the shipper and in a reasonably prudent manner as to matters not covered by the bill of lading or the shipper's instructions, constituted a complete defense where the shipper relied upon a prima facie case, and the carrier was not further required to prove the specific cause of the loss.
- (b) The responsibility assumed by a carrier of perishables is fixed by the agreement contained in the bill of lading in accordance with published tariffs and regulations, which are binding upon the shipper and carrier and may not be waived or varied; the tariff provisions have the force of law and constitute part of the contract between the shipper and carrier, and the effect of same is to limit and define the contractual undertaking of the carrier to carrying out the shipper's instructions and performance of transportation services without negligence.
- (c) The correct rule applicable to shipments of perishables is the same as that involving shipments of livestock, that is, the carrier is exonerated from liability upon showing compliance with the shipper's instructions and performance without negligence of transportation services; and the carrier is not required to additionally prove the cause of the shipper's loss or damage.
- (d) At common law, the carrier was under no duty to furnish special protective services such as refrig-

erator cars, icing or ventilation, and any duty, obligation or liability of the carrier concerning such matters depended upon the agreement between the shipper and the carrier and was entirely distinct from and could not be based upon its general liability as a common carrier."

The jury found, in answer to Special Issue No. 1, that the honeydew melons referred to in Count I were in such condition at the time the bill of lading was signed that, based upon the orders given by the shipper to the carrier for their transportation, and the reasonable performance of those orders by the carrier, they would have been reasonably expected to arrive at destination in good merchantable condition.

In answer to Special Issue No. 2, the jury found that such melons were in worse condition than would reasonably have been anticipated, based upon the condition in which they were at the time the bill of lading was signed, the orders given by the shipper to the carrier for their transportation and reasonable performance of those orders by the carrier.

Under the provisions of the Interstate Commerce Act, 49 U.S.C.A. § 20 (11), which provides in part as follows:

"Any common carrier, railroad, * * * receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State * * * shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered
* * *"

and under the evidence and findings of the jury, the shipper made out a prima facie case of liability against the carrier.

13 C.J.S. 131, § 71; *Panhandle & S. F. Ry. Co. v. Trautmann Bros.*, 341 S.W. 2d 504; *Missouri-Kansas-Texas R. Co. v. Noble*, 271 S.W. 2d 146; *Rogers v. Crespi & Co.*, 259 S.W. 2d 928; *Railway Exp. Agency v. Hueber*, 191 S.W. 2d 710; *Panhandle & S. F. R. Co. v. Wilson*, 135 S.W. 2d 1062.

It is the contention of the shipper that the carrier can only defend against this prima facie cause of action by showing that the damages were due to one or more of the excepted causes at common law; viz., (1) an act of God, (2) the public enemy, (3) the act of the shipper, (4) the inherent nature of the goods themselves.

The jury found, in answer to Special Issue No. 3, that as to the honeydew melons described in Count I, the carrier performed without negligence the transportation services as provided by the terms and conditions of the bill of lading and as instructed by the shipper and in a reasonably prudent manner as to matters not covered by the bill of lading or the shipper's instructions.

In answer to Special Issue No. 4, the jury found that as to the honeydew melons described in Count I, the worsened condition on arrival was not caused by the failure of the carrier to comply with the instructions of the shipper and furnish all services provided by the terms and conditions of the bill of lading.

The jury further found, in answer to Special Issue No. 5, that the worsened condition of the melons on arrival was not in any part caused by the failure of the carrier to transport and care for the melons in a reasonably prudent manner as to all matters not covered by shipper's instructions and the bill of lading.

In answer to Special Issue No. 6, the jury found that the worsened condition of the honeydew melons referred to in Count I, at the time of their delivery at destination, was not due solely to an inherent vice existing at the time the

melons were received by the carrier at Rio Grande City, Texas.

The jury further found, in answer to Special Issue No. 7, that the worsened condition of the melons at destination was not caused solely by the carrier carrying out the instructions given by the shipper to the carrier for handling this shipment.

In answer to Special Issues Nos. 8 and 9, the jury established the loss in market value of the melons due to the worsened condition at destination.

It is the contention of appellant carrier that the jury's answers to the Special Issues show that the carrier carried out the instructions of the shipper and was not otherwise negligent; and that this is a complete defense to the prima facie case established by the shipper, while it is the contention of appellee shipper that the only defense to the prima facie cause of action established by it is to show that the loss was due to one of the excepted causes set out above.

It is conceded by the parties that where an interstate shipment is involved, the liability of the carrier and the measure of damages are determined by the Interstate Commerce Act and the decisions of the Courts of the United States, construing it. See *Missouri Pacific Railroad Co. v. Duncan*, 353 S.W. 2d 315; *Missouri-Kansas-Texas R. Co. v. Noble*, supra.

There are a great many authorities discussing the question here presented, and we are of the opinion that, by the great weight of authorities, the contention of the appellee shipper is sustained. *Panhandle & S.F. Ry. Co. v. Trautmann Bros.*, 341 S.W. 2d 504; *Missouri Pac. R. Co. v. Trautmann Bros.*, 301 S.W. 2d 240; *Thompson v. Bob Tankersley Produce Co.*, 289 S.W. 2d 840; *Thompson v. A. J. Tebbe & Sons Co.*, 341 S.W. 2d 627; *Schnell v. The Vallescura*, 79 L. ed., 373, 293 U.S. 296, 307; *Lehigh Valley*

R. Co. v. State of Russia, 21 F. 2d 396; *Compares de Vapores Insko S. A. v. Missouri Pac. R. Co.*, 232 F. 2d 657; *Reider v. Thompson*, 116 F. Supp. 279; *Secretary of Agriculture v. United States*, 100 L. ed. 173, 350 U.S. 160; *Yeckes-Eichenbaum, Inc. v. Texas Mexican Ry. Co.*, 264 F. 2d 791, cert. den., 4 L. ed. 2d 70; *California Packing Corp. v. The Empire State*, 180 Fed. Supp. 19; *Southern-Plaza Empress, Inc. v. Neal Neville, Jr.* 233 F. 2d 504; *U. S. v. Mississippi Valley Barge Line Co.*, 285 F. 2d 381; *California Packing Corp. v. States Marine Corp. of Del.*, 187 F. Supp. 540; Interstate Commerce Act, Title 49 U.S.C.A., § 20(11); 13. C.J.S. p. 131, § 71, p. 151, § 79. Tariff Rules Nos. 130 and 135, found in Title 49 U.S.C.A., § 20(11), in no way affect the rules laid down in the above cited authorities. We refuse to follow *Southern Pacific Co. v. Itule*, 74 P. 2d 38, 115 A.L.R. 1268, wherein it is held that the carrier's liability with relation to the transportation of vegetables is the same as for livestock, because such holding is contrary to the above cited cases.

This brings us to a consideration of Count II of appellee's petition. Appellant's Point Number Two is as follows:

"Judgment should have been rendered in favor of the carrier on Count II of the petition because:

- (a) There was no evidence, or at least the evidence was insufficient, to establish the condition, particularly the good condition, of the honey dew melons at origin.
- (b) There was no evidence, or, at least the evidence was insufficient, to establish the market value of the commodity at destination, even if the shipment had arrived without any damage; and there is not a sufficient basis for ascertainment of damages if appellee is entitled to recover the same."

We sustain this point. The evidence is insufficient to support the finding of the jury that the melons were in good

condition at the point of origin. The shipper relied upon the recital in the bill of lading to the effect that the melons were in apparent good condition, and the testimony of John Fillpot. The recital in the bill of lading relates only as to the condition of the outside of the crates, and this rule is not changed even though honeydew melons are so crated that a part of each melon can be seen without opening the crates. *Hoover Motor Express Co. v. U. S.*, 262 F. 2d 832.

John Fillpot did not inspect the melons at point of origin. He was asked the direct question whether he could say that he saw "a single one of the melons involved in this case." He answered, "I cannot." He was in general charge of gassing and cooling the melons, but the man who actually did this work did not testify. There was no other testimony as to the condition of the melons at origin than the general statements by Fillpot. We reverse the judgment of the trial court on Count II.

Appellant's Point Number Three is as follows:

"Judgment should have been rendered in favor of the carrier on Count III of the petition because:

- (a) The jury finding on Special Issue Number One, establishing that the honeydew melons involved were not in good condition at origin, that is, they would not reasonably have been expected to arrive at destination in good merchantable condition, based upon the orders of the shipper and the reasonable performance of same by the carrier, prevented judgment for the shipper, where the shipper relied solely on a prima facie case."

The finding of the jury on Special Issue No. 1, on Count III, precluded any recovery by the shipper on Count III. *Missouri Pacific R. Co. v. Trautmann Bros.*, 301 S.W. 2d 240; *Thompson v. Bob Tankersley Produce Co.*, 289 S.W.

2d 840; *Albers Milling Company v. Hauptman*, 95 F. 2d 286.

Appellant's Point Number Four is as follows:

"Judgment should have been rendered in favor of the carrier on Count IV of the petition because:

- (a) There was no evidence, or, at least the evidence was insufficient, to establish the market value of the commodity at destination, even if the shipment had arrived without damage; and there is not a sufficient basis for ascertainment of damages, if appellee is entitled to same.
- (b) The jury award is excessive."

We sustain this point. Appellee in attempting to establish the market value of the peppers relied entirely upon the testimony of Ed Baker. There were no United States Department of Agriculture Market Reports introduced in evidence as to the peppers, and there were no other market reports introduced. Baker admitted that he did not know the market price of U. S. No. 1 peppers on January 26, 1958, in Indianapolis. He based his opinion as to the market value of these peppers upon the account of sales showing that some of them sold for the sum of \$4.00 per basket. In the recent case of *Missouri Pacific Railroad Co. v. Duncan*, 353 S.W. 2d 315, the Austin Court, speaking through Associate Justice Richards, had this to say:

"It is a general rule of law that an account of sales alone is incompetent to establish the reasonable cash market value of a shipment in the condition and on the date of its arrival. *Rio Grande & E.P. R. Co. v. T.A. Austin*, supra; *Thompson v. A. J. Tebbe & Sons Co.*, Tex.Civ.App., 241 S.W. 2d 627, 632; *Reider v. Thompson*, (U.S.C.A. 5th) 197 F. 2d 158, 160."

Appellee's motion for a rehearing will be overruled, and appellant's motion for a rehearing will be granted in part and overruled in part in keeping with this opinion.

Our judgment heretofore rendered herein is set aside and judgment entered in accordance with this opinion; i.e., the judgment of the trial court is affirmed as to Count I, and reversed and remanded as to Counts II, III and IV. The costs of this appeal are taxed one-fourth against appellant and three-fourths against appellee.

W. O. MURRAY
Chief Justice

Opinion delivered and
filed September 12, 1962

**D. JUDGMENT OF TEXAS SUPREME COURT AND ORDER
DENYING MOTION FOR REHEARING**

IN THE SUPREME COURT OF TEXAS
AUSTIN

No. A-9323

MISSOURI PACIFIC RAILROAD CO.

v.

ELMORE & STAHL

From Cameron County, Fourth District.

(May 15, 1963)

° This cause came on to be heard on writ of error to the Court of Civil Appeals for the Fourth Supreme Judicial District, and the original transcript and transcript showing the proceedings in the Court of Civil Appeals having been duly considered, because it is the opinion of the Court that there was no error in the judgment of the Court of Civil Appeals, as follows:

"The motion of Appellant for Rehearing, filed July 11, 1962, coming on to be heard, and it appearing to the Court that there was error in the judgment of this Court, rendered on June 27, 1962, affirming in part and reversing and rendering in part the judgment of the Court below, it is therefore considered, adjudged and ordered that said motion be, and it is hereby granted in part and overruled in part. The judgment of this Court rendered on June 27, 1962, is set aside and judgment here rendered as follows:

"This cause came on to be heard on the transcript of the record, and same being examined, because it is the opinion of the Court that there was no error in the judgment of the Court below in rendering judgment against appellant on Count One, and in favor of appellee, it is therefore considered, adjudged and ordered that said judgment in that respect be, and it is hereby, affirmed.

"But because it is the opinion of the Court that there was error in the judgment of the Court below wherein it rendered judgment, on Counts II, III and IV against appellant, it is therefore considered, adjudged and ordered that said judgment in that respect be, and it is hereby reversed and the cause remanded to the Court below for a new trial in accordance with the opinion of this Court.

"It is further ordered that Appellant, Missouri Pacific Railroad Company, and surety, Fidelity and Deposit Company of Maryland, pay one-fourth of the costs of this Court, and Appellees, Elmore & Stahl, pay three-fourths of the costs in this Court in this behalf expended and incurred, and that this decision be certified below for observance."

it is, therefore, adjudged, ordered and decreed that the judgment of the Court of Civil Appeals be, and is hereby, affirmed, in accordance with the opinion herein this day delivered.

It is further ordered that the costs expended and incurred in this cause in the Court of Civil Appeals remain, as assessed by the judgment of that Court and that petitioner, Missouri Pacific Railroad Company, and the surety on its cost bond on appeal, Fidelity and Deposit Company of Maryland, pay all costs in this cause expended and incurred in this Court, and that this decision, with a copy of the opinion herein this day delivered, be certified to the District Court of Cameron County, Texas, for observance.

I, GEO. H. TEMPLIN, Clerk of the Supreme Court of Texas, do hereby certify that the attached and foregoing page contains a true and correct copy of the judgment of the Supreme Court of Texas in the case of *Missouri Pacific Railroad Company v. Elmore & Stahl*, No. A-9323, from Cameron County, Fourth District, as such judgment appears in the minutes of said Court under the date of May 15, 1963.

IN TESTIMONY WHEREOF, Witness my hand and the seal of the Supreme Court of Texas, at the City of Austin, on this 9th day of July, 1963.

GEO. H. TEMPLIN, *Clerk*

GARSON R. JACKSON

By Garson R. Jackson, *Deputy*

IN THE SUPREME COURT OF TEXAS
AUSTIN

No. A-9323

MISSOURI PACIFIC RAILROAD CO.

v.

ELMORE & STAHL

From Cameron County, Fourth District.

(June 12, 1963)

Motion of petitioner for rehearing, filed in above numbered and entitled cause on May 30, 1963, having been duly considered by the Court, it is ordered that said motion be, and hereby is, overruled.

I, GEO. H. TEMPLIN, Clerk of the Supreme Court of Texas, do hereby certify that the above is a true and correct copy of order of the Supreme Court of Texas on motion for rehearing of cause in the case of *Missouri Pacific Railroad Company v. Elmore & Stahl*, No. A-9323, from Cameron County, Fourth District, as such order appears in the minutes of said Court under the date of June 12, 1963.

IN TESTIMONY WHEREOF, Witness my hand and the seal of the Supreme Court of Texas, at the City of Austin, on this 9th day of July, 1963.

GEO. H. TEMPLIN, *Clerk*

GARSON R. JACKSON

By Garson R. Jackson, *Deputy*

**E. OPINION OF COURT OF APPEALS FOR FIFTH CIRCUIT.
TRAUTMANN BROS. CO., INC. v. MISSOURI PACIFIC RAIL-
ROAD CO.**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19813

TRAUTMANN BROS. CO., INC., *Appellant*,

v.

MISSOURI PACIFIC RAILROAD COMPANY, *Appellee*.

*Appeal from the United States District Court for the
Southern District of Texas.*

(December 27, 1962)

Before HUTCHESON, WISDOM and GEWIN, *Circuit Judges*.

HUTCHESON, Circuit Judge: The appellant filed this suit to recover for damages to six cars of honeydew melons, transported by defendant from Laredo, Texas, to Philadelphia, Pennsylvania. After trial without a jury, the judge held that the defendant was not liable, except for a small part of the damages.¹

At Laredo, the melons were loaded into the cars and iced, under plaintiff's directions, and one Fillpot, an employee of the plaintiff, then pre-cooled the cars with electric fans. The cars did not come under the control of the defendant rail-

¹ As to two cars of the melons, the parties agreed to a settlement and separate judgment was entered. The judge found that the damages to the four other cars amounted to \$1,920.67, of which, however, the defendant was liable for only \$90.64.

road until Fillpot had completed his pre-cooling operations. The plaintiff offered the testimony of witnesses, who had grown and harvested the melons, that the melons were in good condition when they reached the cars at Laredo; and the testimony of another of plaintiff's witnesses, who had been employed to supply gas to the melons after loading, was to the same effect. The defendant did not replenish the ice bunkers at Laredo but waited until San Antonio was reached so that there was a lapse of about twenty-four hours before the cars were re-iced. The cars reached Palestine, Texas, on the following day, where defendant maintains an icing station, which, as to this particular train, was for emergency purposes only, but the cars were not re-iced there. The ice bunkers were refilled when the cars reached Texarkana. When the melons were unloaded in Philadelphia, many of them were found to be overripe and spoiled.

The trial judge found that the temperature in the cars was from forty-five to fifty degrees upon arrival in Philadelphia; and, as the railroad had re-iced the cars at all of the regular stations, that the temperature had probably been kept at the same level throughout the trip, there being no evidence to the contrary. He also found that the ice bunkers were not full when the cars left Laredo, because the cooling fans used by Fillpot had caused the ice to melt much more rapidly than usual; however, as the defendant had no knowledge of these special cooling operations, it was under no duty to re-ice at Laredo. Further, the judge found that the melons were prone to spoilage, on the basis of the following facts: (1) raising such melons in Laredo was a new venture in 1957, when this shipment was made, and was not continued; and (2) forty-nine claims for decay and over-ripeness had arisen from the fifty-two shipments of Laredo melons.

We deal first with appellant's contention that the trial court erred in holding that the defendant was not an insurer. The district judge was correct. A common carrier is

not absolutely liable for spoilage or physical deterioration during the course of shipment.² So long as the carrier has discharged its duty of reasonable care, it is not liable for "damage to a shipment caused . . . by the operation of natural laws upon it . . .;"³ that is, the carrier is not liable for damages occasioned solely by the inherent nature, or vice, of the goods themselves. Nor is the carrier liable for damages caused solely by the acts or directions of the shipper.⁴

The contract between the parties in this case does not render those general rules inapplicable. The bill of lading under which the melons were shipped provided that the carrier received the shipment "subject to the classifications and tariffs." Two such tariff provisions were Rules 130 and 135 of Perishable Protective Tariff No. 17.⁵ These rules serve as we have observed previously, to "limit the liability

² See, e.g., *Atlantic Coast Line R. Co. v. Georgia Packing Co.*, 5th Cir. 1947, 164 F. (2) 1; *Southern Pacific Co. v. Itule, Ariz.* 1937, 74 P. 2d 38, 115 A.L.R. 1268; *Texas & Pac. Ry. Co. v. Empacadora De Ciudad Juarez, Tex.* Civ. App. 1958, 309 S.W. 2d 926, 936-37 (on motion for rehearing), writ refused, n.r.e.

There is an obvious distinction between damage of that type and damages resulting from crate breakage or physical breakage. See *Yeckes-Eichenbaum, Inc. v. Texas Mexican Ry. Co.*, 5th Cir. 1959, 263 F. (2) 791.

³ *Austin v. Seaboard Air Line R. Co.*, 5th Cir. 1951, 188 F. (2) 239, 240. See 9 Am. Jr., Carriers Sec. 725 (1937).

⁴ *Austin v. Seaboard Air Line R. Co.*, supra, note 4. See 9 Am. Jr., Carriers, Sec. 728 (1937).

⁵ Rule 130 provides: "*Conditions of perishable goods not guaranteed by carriers.*—Carriers furnishing protective service as provided herein do not undertake to overcome the inherent tendency of perishable goods to deteriorate or decay, but merely to retard such deterioration or decay insofar as may be accomplished by reasonable protective service of the kind and extent requested by the shipper, performed without negligence."

Rule 135 provides: "*Liability of Carriers.*—Property accepted for shipment under the terms and conditions of this tariff will be received and transported subject to such directions, only, and to

of a carrier transporting perishable goods to liability for negligent failure reasonably to carry out instructions given by the shipper.”⁶ Nothing in Section 20 (11) of the Transportation Act, 49 U.S.C. Sec. 20 (11) precludes a carrier’s limiting its liability in that manner, notwithstanding appellant’s contention to the contrary. The section provides simply that a carrier cannot limit its liability for damages caused by the carrier.

Fact issues were therefore raised by the evidence.

Conceding, as appellant contends, that once it introduced evidence showing that the melons were in good condition when delivered to defendant but were spoiled upon arrival at their destination, it had established a *prima facie* case of liability of the appellee, so that the burden shifted to the appellee, we are of the opinion that the appellee carried that burden. Even if it is true, as appellant contends, that the district court’s finding of inherent vice was based upon improper inferences from general conditions at Laredo, the evidence is nevertheless ample to support the judge’s additional finding that the defendant was not negligent and hence did not contribute to the spoilage. The evidence shows that the train was re-iced at the regular stations; and appellee, being without knowledge of the pre-cooling operations, was under no duty to re-ice at Laredo.

We have considered all of appellant’s arguments and none of them, in our opinion, warrants reversal. The judgment is accordingly

Affirmed.

such election by the shipper respecting the character and incidents of the protective service as are provided for herein. The duty of the carriers is to furnish without negligence reasonable protective service of the kind and extent so directed or elected by the shipper and carriers are not liable for any loss or damage that may occur because of the acts of the shipper or because the directions of the shipper were incomplete, inadequate or ill-conceived.”

⁶ Atlantic Coast Line R. Co. v. Georgia Packing Co., *supra*, note 2.

**F. CONCLUSIONS OF LAW OF THE DISTRICT COURT IN
TRAUTMANN BROS. CO. v. MISSOURI PACIFIC RAILROAD CO.**

I.

Plaintiff made out a prima facie case of defendant being liable before it rested its case.

II.

Upon the plaintiff making out such a prima facie case as above the burden of proceeding with the evidence shifted to the defendant. However, the burden of proof as distinguished from the burden of proceeding does not change and remains on plaintiff. Defendant sustained this burden of proceeding with the evidence. It rebutted any such prima facie case or presumption in plaintiff's favor.

III.

Upon the carrier overcoming, as it did, the shipper's prima facie case, plaintiff again had the burden of proceeding with the evidence and it continued to have the burden of proof. Plaintiff did not sustain this burden.

IV.

When a shipment of a perishable commodity like honeydew melons arrives at destination showing damage and the carriers show that they handled the shipment in the manner specified by the shipper and that they exercised reasonable care to prevent damage from any cause not necessarily involved in the method of transportation so chosen by the shipper, the carriers have established a defense to the shipper's action for damages. That was established here.

V.

The rules of law announced by the Supreme Court of Arizona in *Southern Pacific Company v. Itule*, 74 P.2d 38, 115 A.L.R. 1268, apply to these interstate shipments of perishables.

VI.

Defendant and its connecting carriers are not insurers that shipments of perishable commodities such as honeydew melons would be in good condition and undamaged at destination.

VII.

Plaintiff is charged with knowledge of the provisions of Perishable Protective Tariff No. 17.

VIII.

The provisions of the Perishable Protective Tariff No. 17 were part of the contract of shipment between the plaintiff and the carriers. These provisions were effective to specify the terms and conditions of the protective service plaintiff was entitled to have the carriers perform under the instructions given by the shipper and to excuse the carriers from liability for damage not caused by improper carrier service, but rather due to plaintiff's directions being inadequate, incomplete, or ill-conceived, or to the inherent tendency of the shipment to deteriorate and decay.

IX.

The carrier is not responsible for the effects of the shipments not being re-iced at Laredo but rather this was due to the failure of the plaintiff to advise the defendant of the cooling activities carried on by Fillpot, or to re-ice the shipment or to pay the carrier for the ice so consumed in cooling operations which would have resulted in the car being re-iced by defendant before being switched from the ice company dock. When, as here, a shipper pre-cools a shipment, he must do so with his own ice, but if he uses the ice of the railroad, he must notify the railroad and pay extra charges so that the railroad can then be charged with the responsibility of re-icing the car at origin; unless the shipper replenishes it himself.

X.

Plaintiff is entitled to recover from defendant the amounts of the physical damage [breakage] as set out above in Paragraph XXVII of the Findings of Fact. Plaintiff is not entitled to recover any additional amount and defendant is discharged of all additional claims of liability.

XI.

If, however, on appeal this judgment should be reversed and it should be held that plaintiff is entitled to recover its damages, then I find and hold that the full amounts of damage and amounts of balance recoverable (the full damage less the physical injury which plaintiff is recovering) are as follows:

COUNT	FULL DAMAGE	PHYSICAL INJURY	BALANCE RECOVERABLE
II	\$586.41	\$12.22 ⁰³	\$574.19
III	350.64	72.50	278.14
IV	379.73	2.22	377.51
VI	603.89	3.70	600.19

XII.

All recovery, except for such physical damage, is denied. In view of the agreed settlements, costs are awarded to plaintiff.

These findings supplement and do not supercede the findings announced orally at the conclusion of the trial.

Signed for entry at Corpus Christi, Texas this 23rd day of January, 1962.

REYNALDA G. GAY
Judge Presiding

**G. OPINION OF COURT OF APPEALS FOR NINTH CIRCUIT.
LARRY'S SANDWICHES, INC. v. PACIFIC ELECTRIC RAIL-
WAY CO.**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18,265

June 3, 1963

LARRY'S SANDWICHES, INC., a California corporation,
Appellant,

v.

PACIFIC ELECTRIC RAILWAY Co., a California corporation,
Appellee.

Upon Appeal From the United States District Court for
the Southern District of California, Central Division

Before: JERTBERG and MERRILL, Circuit Judges, and
WEIGEL, District Judge

MERRILL, Circuit Judge:

Appellant is suing appellee railroad under the Carmack amendment to the Interstate Commerce Act, 49 U.S.C. section 20(11), to recover for damages to a shipment of frozen sandwiches delivered by appellant to the railroad at Culver City, California, for shipment to Chicago. Upon arrival at Chicago it was discovered that some of the sandwiches were not in a frozen condition. The shipment was rejected by the consignee and returned by the railroad to appellant in California.

This appeal presents the related problems of the nature of the carrier's obligation respecting shipments of frozen food, and the burden of proof as to the cause of damage suffered by such a shipment en route.

The sandwiches were not subject to visual inspection at the time of loading, since they were individually wrapped in foil, sealed and placed in cardboard boxes which in turn

were placed in corrugated paper cases and sealed with tape. The lading was not subject to observation en route, since the car was loaded by appellant and the doors were sealed at origin and were not unsealed until arrival at destination.

The bill of lading recited that the shipment was received by the railroad "in apparent good order, except as noted (contents and condition of contents unknown)."

Appellant presented evidence as to the manner in which it had prepared the sandwiches for shipment, and the manner in which they had been loaded. Unquestionably it made out a sufficient prima facie case that the lading was delivered to the carrier in good order.

The railroad offered evidence as to the car's refrigerating performance (as determined by the record of thermometer readings within the car) to show that the participating carriers had exercised ordinary care and had fully satisfied the requests of the shipper for refrigerated protective service and the protective tariff rules applicable to perishable goods. Further it endeavored to show that there was a reasonable possibility that the shipment was not completely frozen when loaded in Culver City.

The district court found that the railroad had carried out the shipping instructions and complied with all tariff rules, and that appellant had failed to show negligence on the railroad's part.

Appellant asserts that the district court erroneously failed to impose upon the railroad the proper standard of duty and burden of proof. It contends that the railroad should be held liable as insurer unless it met the burden of establishing that the damage had resulted from the condition of the goods at the time of loading.

The Carmack amendment has been construed as codifying the common law rule of a carrier's liability. See *Secretary of Agriculture v. U. S.* (1956) 350 U.S. 162, 165, n. 9. At common law, a carrier transporting durable goods

was under an insurer's obligation and liable for all damage to such goods without proof of negligence, unless it was able affirmatively to show that the damage was occasioned by one of five specific causes: the shipper, acts of God, the public enemy, public authority or the inherent vice or nature of the commodity. See, e.g., *Chesapeake & O. R. Co. v. Thompson Mfg. Co.* (1926) 270 U.S. 416, 421-422.

Thus, at common law "a carrier was not liable for damage occasioned by the inherent vice or nature of the goods in the absence of negligence." *U. S. v. Reading Company* (3 Cir. 1961) 289 F. 2d 7, 9; See *Secretary of Agriculture v. U. S.*, *supra*.

Where perishable goods are involved the provisions of the Carmack amendment codifying the common law are given force through the Perishable Protective Tariff No. 18 of the General Rules and Regulations of the Interstate Commerce Commission. Rules 130 and 135 of that tariff¹ establish the tests of negligence.

¹ "Rule 130

CONDITION OF PERISHABLE GOODS NOT GUARANTEED BY CARRIERS

Carriers furnishing protective service as provided herein do not undertake to overcome the inherent tendency of perishable goods to deteriorate or decay, but merely to retard such deterioration or decay insofar as may be accomplished by reasonable protective service, of the kind and extent requested by the shipper, performed without negligence."

"Rule 135

LIABILITY OF CARRIERS.

Property accepted for shipment under the terms and conditions of this tariff will be received and transported subject to such directions, only, and to such election by the shipper respecting the character and incidents of the protective service as are provided for herein. The duty of the carriers is to furnish without negligence reasonable protective service of the kind and extent so directed or elected by the shipper and carriers are not liable for any loss or damage that may occur because of the acts of the shipper or because the directions of the shipper were incomplete, inadequate or ill-conceived."

Upon proof of the perishable nature of the goods the carrier is relieved of its insurer's liability, and its duty becomes one "to furnish without negligence reasonable protective service of the kind and extent so directed or elected by the shipper * * * " (Rule 135).

Thus, in the case of perishable goods the burden upon the carrier is not to prove that the damage resulted from the inherent vice of the goods, but to prove its own compliance with the rules of the tariff and the shipper's instructions. See e.g., *U. S. v. Reading Company*, supra; *Illinois Packing Co. v. Atchison, Topeka & Santa Fe Ry. Co.* (7 Cir. 1956) 236 F. 2d 908, 909-910; *Delphic Frosted Foods Corp. v. Illinois Central R. Co.* (6 Cir. 1961) 188 F. 2d 343, 346-347.

Appellant contends that it is error to regard frozen foods as perishable. It asserts that freezing renders food inanimate, and that in a properly refrigerated environment this condition would continue indefinitely.

We cannot agree. The furnishing of an artificial environment does not confer an imperishable status upon that which normally would be recognized as perishable. Rather it is the perishable character of frozen goods which requires that they be protected by an artificial environment. Were appellant's argument to be accepted no commodity ordinarily subject to deterioration could be classified as perishable so long as it was presented to the railroad in a frozen condition. The tariff for perishable goods would be rendered meaningless.²

Appellant asserts error in the failure of the district court explicitly to find as to the condition of the goods on delivery to the railroad. The court found only (in the words

² Other courts faced with this problem have classified frozen foods as perishable. See, e.g., *Delphic Frosted Foods Corp. v. Illinois Central R. Co.*, supra (frozen fruit); *Illinois Packing Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, supra (frozen beef ribs).

of the bill of lading) that the goods were in apparent good order.

We find no prejudicial error in this lack. We assume that appellant had satisfactorily made out a prima facie case of delivery in good order. That case was met by the railroad's proof of the perishable character of the shipment and of its own compliance with the requirements of the tariff and the shipper's instructions. The ultimate burden of persuasion then lay with the shipper to prove, by showing specific acts of negligence, that notwithstanding such apparent compliance, the railroad had failed to use due care. Appellant, by never advancing beyond its prima facie case, did not meet that burden in this case. It thus failed to overcome the railroad's proof, persuasively tending to exclude the possibility of negligence. See *Chesapeake & O. R. Co. v. Thompson Mfg. Co.*, supra, 270 U.S. 416, 423.

Affirmed.

(Endorsed) Opinion Filed June 3, 1963.

Frank H. Schmid, Clerk.

**H. OPINION OF HOUSE OF LORDS. F. O. BRADLEY & SONS
LIMITED v. FEDERAL STEAM NAVIGATION CO. LTD.**

Feb. 21, 22, 24, 25, 28, and April 4.

(Before Lords SUMNER, ATKINSON, WRENBURY, CARSON,
and BLANESBURGH.)

**F. O. BRADLEY AND SONS LIMITED v. FEDERAL STEAM NAVI-
GATION COMPANY LIMITED.***

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

*Ship—Bill of lading—Cargo of apples—Damage to cargo
—Cause of damage—"Inherent defect, quality, or vice of
the goods"—Onus of proof—Sea-Carriage of Goods Act
1904 (No. 14 of 1904).*

Apples were shipped from Hobart (Tasmania) to the United Kingdom on board the defendants' steamship N. under bills of lading, each of which contained the following overriding provision: "This bill of lading is to be read and construed as if every clause therein contained which is rendered illegal or null and void by the Sea-Carriage of Goods Act 1904 had never been inserted therein or had been cancelled and eliminated therefrom prior to the execution thereof and is issued subject to all the terms and provisions of and to all the exceptions from liability contained in such Act." And by the Sea-Carriage of Goods Act 1904 it was provided by sect. 8, subsect. (2): "In every bill of lading . . . unless the contrary intention appears, a clause shall be implied whereby, if the ship is at the beginning of the voyage seaworthy in all respects and properly manned, equipped and supplied, neither the ship nor her owner . . . shall be responsible for damage to . . . the goods resulting from . . . (D) the inherent defect, quality, or vice of the goods." When the apples, after their arrival in the United Kingdom, were distributed to the trade, extensive damage was

* Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

found by reason of the fact that a large proportion of the apples were proved to be affected with a species of internal browning. An action was accordingly brought by the endorsees of the bills of lading against the ship-owners claiming damages for breach of contract: for negligence and unseaworthiness; and the plaintiffs alleged that although the apples were good shipping apples, suitable for the voyage in kind, in ripeness and in packing, they were damaged on account of the faulty ventilation of the ship. The defendants' case was that the *N.* was a seaworthy ship and they relied on sect. 8, sub-sect. 2(p), of the Act as exonerating them.

Held, that the damage was caused to the apples not because of the ship or of the sea, or of the route, but because they were apples which were not fit to make the voyage in an ordinary way. This was not the kind of risk which the Act called on the shipowners to bear and it was well within the words "resulting from . . . inherent quality or vice."

Decision of the Court of Appeal affirmed.

APPEAL by the plaintiffs from a judgment of the Court of Appeal (Bankes and Scrutton. L.JJ.; Atkin, L.J. dissenting) dated the 26th March 1926.

The plaintiffs in the action, who were fruit merchants carrying on business in London, sought to recover from the defendants in respect of damage caused to a large consignment of Tasmanian apples shipped on board the defendants' steamship *Northumberland*, in the month of April 1921, for carriage from Hobart (Tasmania) to London and Liverpool. The plaintiffs claimed as owners of the consignment, namely, 15,272 cases of apples, and as holder for value and (or) endorsees of six bills of lading in respect thereof. No question arose as to the plaintiffs' title to the goods. The main question in issue at the trial was whether the damage occurred during transit, and if so, whether the defendants were liable.

In the year 1921 when the voyage in question took place the *Northumberland* was under requisition to His Majesty's Government at fixed Blue Book rates, and in accordance with directions given the *Northumberland* had been directed to proceed to Hobart and other ports and there load, *inter alia*, a cargo of apples. In pursuance of such direction she arrived at Hobart on the 18th April 1921, where she loaded a cargo consisting of 144,610 cases of apples (including the plaintiffs' consignment) and 8822 trays of pears. She arrived at Tilbury on the 15th June, where she discharged her London cargo and then proceeded to Liverpool. When the London consignment of apples came into the hands of sub-purchasers it was found that a proportion of the apples were affected with a species of internal browning, and the Liverpool consignment was found to be similarly affected.

The plaintiffs' claim was based on breach of the contract to deliver safely evidenced by the bills of lading, and upon negligence and unseaworthiness in connection with the ventilation of the holds and the withdrawing of gases from the same.

The defendants' case was that the *Northumberland* was a seaworthy ship; that there had been no negligence in or about the carriage; and that the damage was due to the inherent quality of the apples shipped and (or) to decay, and they relied on sect. 8, sub-sect. 2(d), of the Australian Sea-Carriage of Goods Act 1904.

The facts and relevant terms of the bills of lading and of the sections of the Act are set out in Lord Sumner's opinion.

Branson, J. held that there must have been constitutional trouble with the apples, and that the vessel was not unseaworthy. He therefore directed judgment to be entered for the defendants. His decision was affirmed by the Court of Appeal (Bankes and Scrutton, L.J.J.; Atkin, L.J. dissenting).

The plaintiffs appealed.

Stuart Bevan, K.C., *S. L. Porter*, K.C., and *W. L. McNair* for the appellants.

W. A. Jowitt, K.C. and *G. St. C. Pilcher* for the respondents.

The House took time for consideration.

LORD SUMNER.—In 1921 the respondents' steamship *Northumberland* discharged from her refrigerated compartments a large quantity of Tasmanian apples at Tilbury. No casualty and no exceptional weather had befallen the ship. The apples appeared to be and on the surface were in excellent condition, but, soon after they had been distributed to the trade, extensive damage was found. It was of a kind quite new to shippers and shipowners generally. In 1922 the *Northumberland* again shipped a large quantity of apples and similar damage again occurred. In neither year was this kind of damage confined either to this ship or to ships fitted with the same grid-refrigerating system. A scientific investigation of apples and their diseases, with special reference to storage and transport by sea, was at that time in progress at Cambridge. Attention was directed to these mishaps in 1922, and in 1923 trained observers from Cambridge visited Australia to examine and report on local and transport conditions. This action was brought by endorsees of the bills of lading of part of the cargo of 1921.

The documents were in a form, which contained a full collection of the protective exceptions and clauses in which modern bills of lading abound, but, as the voyage was one to which the legislation of the Commonwealth of Australia applied, there was included the following overriding provision:—

CLAUSE PARAMOUNT.—This bill of lading is to be read and construed as if every clause therein contained, which is rendered illegal or null and void by the Sea-Carriage of

Goods Act 1904, had never been inserted therein or had been cancelled and eliminated therefrom prior to the execution thereof, and is issued subject to all the terms and provisions of and to all the exemptions from liability contained in such Act.

A question was raised below, but not before your Lordships, as to the extent to which certain protective words in the bill of lading form survived elimination by the paramount clause, and particularly as to an exception of "decay," a limitation upon the amount of the ship's liability for damage, and a requirement of specially early notice of claim. I need say nothing on these points and will deal with the case, in the manner most favourable to the appellants: viz., as though the above Act exclusively governed the conditions of exemption from liability for damage brought to light during and at the end of the voyage. Your Lordships were not informed of anything in the law of the Commonwealth, except the above Act, that would affect the matter, and the bill of lading itself provides that "all questions arising under this bill of lading shall be settled according to the principles of English law."

The bill of lading described the goods as "shipped in apparent good order and condition" and proceeded "and to be delivered at the ship's anchorage from her deck (where the ship's responsibility shall cease) at the Port of London." Though the usual words "in the like good order and condition" do not appear after the word "delivered," it was common ground that the ship had to deliver what she received, as she had received it, unless relieved by excepted perils. Accordingly, in strict law, on proof being given of the actual good condition of the apples on shipment and of their damaged condition on arrival, the burden of proof passed from the consignees to the shipowners to prove some excepted peril which relieved them from liability, and further, as a condition of being allowed the benefit of that exception, to prove seaworthiness at Hobart, the port of shipment, and to negative negligence or miscon-

duct of the master, officers and crew with regard to the apples during the voyage and the discharge in this country.

Greatly to the advantage of a speedy and satisfactory trial, the statement of claim pleaded the 'plaintiffs' whole case, whether the burden of proof was strictly on them in the first instance or only passed to them in rebuttal, and the evidence was called in the same way. No real difficulty arises, now that all the evidence is out, in adjusting the obligation of proof in accordance with the strict rights of the parties.

The substance of the appellants' case was shortly as follows: The apples were good shipping apples, suitable for the voyage in kind, in ripeness, and in packing. They were damaged because they were kept during this long voyage in unventilated compartments. This was the active and exciting cause of the damage, but it was assisted by the fine weather met with on the voyage. This case was rested principally on the scientific investigation before mentioned, coupled with evidence taken at Hobart of the condition of the apples, when maturing in the orchards and when gathered, send down to Hobart and shipped.

The reply was this. The ship was in every way unexceptionable. Her refrigeration was effected by brine pipes, arranged within the refrigerated compartments themselves and not screened off from the adjacent cargo, though not in contact with it. When the compartments were loaded, pains were deliberately taken to close all apertures. Not only was no ventilation provided for the apples but the intention was to prevent it, except in so far as some interchange between the atmosphere in the refrigerated chambers and that outside them is inevitable. This, which the consignees said was the guilty cause of the damage, was in the eyes of the shipowners and their technical advisers the most beneficial mode of treatment and quite innocuous to any ordinary apples fit to be taken to sea at all.

The explanation of this apparent paradox is simple. In 1921 there were two systems in vogue for the carriage of fruit in refrigerated chambers, one that adopted in the *Northumberland* and many other ships, the other a system in which the refrigeration was effected by cooling air mechanically in a separate chamber and then forcing it by fans into the refrigerated chambers and out again. Both were pretty equally in use. Both types of ship had carried and delivered cargoes quite satisfactorily. With the exception of one little-known case in 1911, as to which but scanty evidence was forthcoming, no damage, such as occurred on this voyage, had ever been known before in the Tasmanian trade among practical men. According to the experience of the day the *Northumberland* was equipped and her refrigerating system was managed during the voyage in a perfectly proper manner. As for those on board, they could have admitted ventilation to the hold by removing hatches and otherwise but, in the then state of knowledge, they did not suppose and were not instructed that it would be right to do so. On this evidence Branson, J. found the ship to have been seaworthy at the commencement of the voyage and held that there had been no want of care in the course of it. In the Court of Appeal, Bankes and Scrutton, L.JJ. expressly agreed with him, while Atkin, L.J., who delivered a dissentient judgment, expressed no opinion on this point. Your Lordships, with very full assistance from counsel, have examined the evidence in detail and I think are unanimously of the same opinion as the majority in the Court of Appeal.

In the law of carriage by sea neither seaworthiness nor due diligence is absolute. Both are relative, among other things, to the state of knowledge and the standards prevailing at the material time. The words "properly equipped" in the Commonwealth Act also, in my opinion, import no absolute propriety, whatever that may be, but must be read as being relative only. For seaworthiness, the material time is the date of sailing; for due care, the

period of the voyage. There was, to say the least of it, no real reason at the time to condemn or to decry the un-screened grid arrangement adopted on the *Northumberland*, or the exclusion of ventilation, and it is only against these that any attack is made. They were in general and successful use. The other arrangements and systems were not markedly superior, if at all, and the damage now in question was virtually unknown under both. Nor could the ship be said to have been sent to sea in an unseaworthy condition, on the ground that the stoppage of ventilation could not be undone in case of need—if, for example, damage was found to be extending in the cargo—for, if ventilation was required, the ship had very ready means of admitting air when necessary, by opening hatches and so forth, and, to the extent to which, according to the knowledge of the time, this might be requisite, the officers were free and able to do so. They were not sent to sea fettered by inviolable orders never to alter the ventilation system at all, but they were instructed in what was believed to be the better system and in general they kept the holds sealed. Accordingly they could not be negligent in acting, like their masters, according to one of the accepted views of the time. In fact, during the voyage they were unaware that any damage was in progress.

On these findings the shipowners contend that they are excused by the exception in the Act of "inherent quality." These words, and not the other contiguous words, seem to me to be those most suitable for consideration, though, no doubt, the others form a material context. The whole clause in the Act runs as follows:

8 (2).—In every bill of lading with respect to goods, unless the contrary intention appears, a clause shall be implied whereby, if the ship is at the beginning of the voyage seaworthy in all respects and properly manned, equipped and supplied, neither the ship, nor her owner, master, agent or charterer, shall be responsible for damage to or loss of

the goods resulting from . . . (d) the inherent defect, quality or vice of the goods.

Accordingly the following questions have to be asked: What was the actual damage and in what did it consist? What caused it? Did the cause arise on shipboard or during the voyage? If not, is there anything proved as to the fruit before shipment that shows the cause of the damage? If nothing is proved, is it admissible to infer, from the negation of all other causes, some unspecified idiosyncrasy, propensity or quality, inherent in the fruit, and if so, does such an inference establish "inherent quality or vice"?

The actual damage to the apples was entirely internal. The skin was intact and showed no sign of the state of things within. The core was unaffected, but the intermediate substance was brown, generally in patches but sometimes altogether so, and in this condition turned later on to decay and finally to dust.

About twenty per cent. of the entire cargo of apples is thought to have been damaged, but owing to the late date at which the mischief was discovered, the exact figure is not known. This percentage was distributed, not merely throughout the whole of the apple cargo or even throughout the whole of a single compartment, but throughout separate cases. Of two apples side by side, one might be damaged and the other sound, yet both might appear to be in perfect condition. This diversity is of great importance, but what determined it is not known.

The evidence of the scientific experts as the result of their observations was quite positive and unchallenged. The cause of this damage was exposure to an excessive concentration of carbon dioxide combined with an insufficient proportion of oxygen in the atmosphere, in which the apples were stored. They relied partly on laboratory experiments and partly on their observations on shipboard.

Their explanation was this. An apple, as part of its vital process, exhales carbon dioxide as the result of its consumption of oxygen from the atmosphere. There is an internal atmosphere also in the microscopical ducts and canals within the apple, in which an excess of carbon dioxide and a deficiency of oxygen may occur. When the external atmosphere to which the apple is exposed contains a concentration of carbon dioxide in excess of 13.6 per cent. danger begins, and, unless the atmosphere is corrected by ventilation, damage shortly follows. The apple suffocates and dies. Carbon dioxide, however, at a lower concentration has a beneficial effect. Up to ten per cent. it retards the process of ripening, and, at the normal storage temperature of 35 deg. Fahr., prolongs the apple's life. The experts said, with confidence, that the mischief was done in the *Northumberland's* holds. They had been intentionally sealed up so as to avoid ventilation as far as possible. In such conditions she stifled her cargo of living apples, and the name of the disease, of which they died, was "Brown Heart."

According to the scientific witnesses and their printed report, "Brown Heart" is not a matter of infection or due to any parasitic organism. It is a pathological condition; a functional disorder. There is, however, another cause of damage in apples, which is called "Internal Breakdown." The visible symptoms of "Internal Breakdown" are the same as those of "Brown Heart." There is the same fair outside and the same decay within; the same brown spots or patches in the same intermediate portions of the apple. What causes "Breakdown" is not determined, but it is the *differentia* of "Brown Heart" that it is caused by ill-ventilated holds, and that of "Internal Breakdown" that it is not, for it arises somehow or other on shore.

In these circumstances the defendants called the *Northumberland's* captain and chief engineer and one of her refrigerating engineers, and their evidence has all along been

recognized to be of crucial importance. They said that in the course of their duties they entered the different refrigerated compartments in rotation, and thus paid several visits to each during the voyage. They were chiefly concerned to examine the brine pipes, but they also took some notice of the apples. The scientific witnesses candidly stated that on the one hand convection currents would distribute any carbon dioxide uniformly throughout the compartment. "Carbon dioxide mixes uniformly with the enclosed atmosphere and practically as quickly as it is formed": (Food Investigation Report, No. 12, p. 2). It would not fall to the bottom of the hold or hang about in patches or pockets. On the other hand, at a concentration of the order of seven per cent. of carbon dioxide, human beings die. Now these officers, one and all, were none the worse for it. They said they never noticed the presence of carbon dioxide, though they were quite alive to the risk that it might be there in quantities dangerous to themselves. Their credit as honest witnesses has not been impugned. Their routine of duty was probable in itself, was unlikely to have been neglected and was a matter about which mistake was hardly possible. Branson, J. accepted their evidence in its entirety, and if the case is left there, the apples were no more suffocated in the holds than were the officers. It is true that a similar routine was observed in 1922, when, according to the scientific witnesses, "Brown Heart" was indubitably the cause of the damage found on discharge, but it was the 1921 voyage and not that of 1922 that was tried, and I think we know too little of the later voyage to be guided by their conclusions about it.

The appellants met this difficulty at your Lordships' Bar by two explanations, neither, I think much developed at the trial. The excessive concentration of carbon dioxide, they said, would be dissipated from time to time by unintentional ventilation. The officers' visits always happened to occur when the carbon dioxide was at or below 7 per cent. In the much longer intervals when they were absent,

it accumulated to more than 13.6 per cent., and so remained for periods sufficient to cause the damage. No doubt, if it is assumed that the apples were suffocated as described, and if the evidence of the officers is nevertheless accepted, these singular phenomena must have occurred, since no others would be consistent with the premises. This may be logical, but I think it asks too much of coincidence. After all, the question is how the apples came to be damaged, now the theory of "Brown Heart" damage can successfully be vindicated. As for unintentional ventilation, no doubt there was some, but as express precautions had been deliberately taken to make it as little as possible it seems only fair to expect some precise determinations of the extent to which the atmosphere of one compartment could interchange with an adjacent atmosphere in a given time, and also of the extent to which that interchange would carry off the carbon dioxide and substitute normal air, and these were not forthcoming. Mere estimates took their place. All these compartments were below the shelter deck. The largest of them were lower holds and well below the water line. Interchange between 'tween decks and lower holds would not greatly change matters, and access to the outer air must chiefly have taken place, when the caps were periodically taken off the thermometer tubes in order to read the instruments.

It is plain that some method of accounting for the disappearance of a tell-tale quantity of carbon dioxide before the officers' visits came round, when it might have been remarked, was vital to the appellants' case. They suggested, disregarding the positive evidence of the engineers to the contrary, that, between the loading of the apples at Hobart and the clearing of the *Northumberland* for sea at Adelaide, no visits were paid to these holds, and that the combination of fairly high temperatures with fair weather at sea and still water in port would cause a great and rapid exhalation of carbon dioxide. Before the engineers began their inspection of the chambers on finally proceeding to sea, the dam-

age was done, though the fact was unsuspected. Hence the argumentative importance of unintentional ventilation. Nothing else could clear away this excessive accumulation after it had done its work and before the engineers entered the holds; nothing else could account for the fact that, although the uninjured apples must have been producing their accustomed quantity of carbon dioxide during the rest of the voyage, either there never was any excess over 6 or 7 per cent. or, if there was, it somehow made its exit regularly and before it could be observed. The suggested means by which the fatal quantity was so regularly reduced to one that was too small to be noticed was very largely the panting of the ship herself. No ship, it was said, can be built absolutely rigid, which is true, and a regular deformation of the sides or decks of a compartment, as the ship worked in a sea way, might alternately expel and inject air under pressure, through such crevices and apertures as might exist. There could have been no apertures, except such as were known and kept as far as possible tightly closed, because nothing went wrong either with the insulation or the hull, and no damage to the ship is suggested. Even if this effect was large it would fail to support the theory, if the foul air forced out was promptly drawn in again. I heard no reasonable explanation of the way in which a reciprocating bellows action, going on at the hatches, now out and now in, could regularly expel a foul atmosphere and as regularly draw in only a pure one. The 'tween deck hatches did not open direct into the outer air. Further, I find it impossible to believe that such a panting effect would be anything but minute, in the absence of evidence from practical marine architects and surveyors to corroborate the scientific, and, I take leave to add, the theoretic evidence of Dr. Kidd's assistants. With regard to the practical tests made in 1923 by isolating a few cases of apples in a box, kept among other apples in a hold fitted with grid refrigeration and not intentionally ventilated, I think that, although the results are striking, the scale of the experiments was too small and the

conditions were too little detailed in the evidence, to make them outweigh the great body of proof, which acquitted the absence of intended ventilation on this voyage of having caused the "Brown Heart" damage.

If, then, the mode of carriage did not damage the apples, their disease was not proved to be "Brown Heart," and if, on the other hand, it was not specifically proved to be "Breakdown" or any other known complaint of apples, must one not infer that the cause was after all some unidentified defect or some propensity in the particular apples, which suffered damage, when most of the apples escaped?

It was on this point that Atkin, L. J. based his dissentient judgment. He preferred the evidence of the scientific witnesses to the arguments against it based on the officers' visits to the holds and on practical experience. He expressed the opinion that under the Act the shipowners remained liable for damage occurring while the apples were on board, unless they could excuse themselves under some definite exception, and he concluded that, if the exception relied on was damage resulting from inherent quality or vice, they had failed to prove their defence. With the utmost respect for the learned Lord Justice's opinion, I am unable to agree with it. The evidence called by the respective parties was very different in kind. On the ætiology of this particular disease no doubt the scientific witnesses alone were of authority, but the question, whether on this particular voyage the apples were exposed to fatal doses of carbon dioxide, depended quite as much on the construction and management of the ship as on any matter of science, and Dr. Kidd himself, in an admission which was properly relied on by Branson, J., recognized that there might be room for some other cause than that to which he traced the damage. Again, accepting the Lord Justice's theoretic construction of the bill lading, it does not appear to me that on the present facts there is room for something unknown between insufficient ventilation and inherent quality or vice, nor can I

agree, if the cause of the damage was inherent quality or vice, that the shipowners would fail merely because they could not put a name to the vice or specify some particular inherent quality and distinguish it from all others. Both terms are quite general. When the common law makes the ship bear the risks of the voyage and of all that may happen to the cargo in the course of it, but excepts the act of God, the King's enemies and inherent vice, the scheme is evident. The act of God and the King's enemies neither party can wholly guard against, so the loss lies where it falls. For the rest, the carrier answers for his ship and men, the cargo-owner for his cargo. The carrier has at least some means of controlling his crew and has full opportunity of making his ship seaworthy, but of the cargo he knows little or nothing and, as the skipper has the advantage over him in this respect, he must bear the risks belonging to the cargo. Such being the scheme, to which the Commonwealth Act gives expression, can it be said either that the shipowners must fail, if they cannot specify what the particular quality or vice inherent in the cargo may have been, or if, having means of saving the cargo from the consequences of its own qualities or vices during the voyage, they have failed quite innocently to use them? In the first case, the cargo-owner is to say: "You may have cleared your ship and men, but even so, till you find out the actual and specific cause of the decay of my apples, you do not shift the risk to the cargo on to me." In the second he says: "If my cargo was stifling in your hold, as other living things would, because you did not give it air, you cannot escape liability for the resulting damage by saying that it is my fault for having apples that cannot stand being suffocated at sea."

The appellants, however, contended that their proof of the sound condition of the apples, when shipped, did something more than shift the burden of proof. To the admission in the bill of lading of the appearance of good condition, they had added a considerable body of evidence taken at Hobart early in the case, which showed that the whole

crop in the 1921 season, both early kinds and late, was exceptionally good, was favoured by weather and free from pests, and was harvested in a satisfactory manner. Many of the apples shipped and more particularly of those shipped by the appellants' sellers themselves came from the later ripening districts and were therefore less matured and better fitted to meet the trials of the voyage. These witnesses were not cross-examined to suggestions of any latent weakness or any seeds of disease then existing in the apples. Hence, it was said, inherent vice in general has been negatived in advance, and only specific proof on grounds not cross-examined to will even relieve the ship-owner for the time being from the burden of clearing himself. When in addition to this, proof is given of a mode of carriage well known and in general use, which would have prevented the inherent quality of the apples in the widest sense of the term from resulting in damage at all, that damage cannot be shown to have resulted without liability to the ship even though seaworthiness and care be proved. It was further suggested that inherent vice is a term indicative of some abnormal defect or disease, and that the normal fact that apples are but mortal is not sufficient to satisfy this or the other expression used, viz., "inherent quality."

I am not able to assent to this contention. It appears to raise the old controversies about *causa causans* and *causa sine qua non* and to force into undue prominence the words "resulting from." I think it may be answered in either of two ways. Branson, J. argued thus. The evidence has eliminated the operation of an excessive concentration of carbon dioxide, to which the disease of "Brown Heart" was ascribed. If the apples did not die a natural death, some other failing must have caused it, and as they are not said to have been otherwise ill-treated on board ship, that failing must have been at least latent before shipment. The negation of the one establishes the other. It appears to me that this was a legitimate train of reasoning and your

Lordships are not called upon to dissent from it: (*Kendall v. The London and South-Western Railway Company*, 26 L. T. Rep. 735; L. Rep. 7 C.P. 373). The similarity of the appearances in the case of "Brown Heart" and of "Break-down," and the common knowledge of mankind, that apples are but perishable things, afford material for saying that the damage was caused ashore and might well have arisen there without its having been possible to prove when it arose or where or how?

The other way is to say that the "inherent quality" referred to is not said to be an inherent bad quality and that the words are "resulting from" not "solely resulting from." The nature of the apples, which were damaged—whether they were simply weaker than their neighbours or had some idiosyncrasy—was such, that they could not stand the voyage. They decayed, not because of the ship or of the sea, or of the route, but because they were apples which were not fit to make the voyage in an ordinary way. This is the kind of risk which the Act does not call on the shipowner to bear, for he has had nothing really to do with it and it is, in my opinion, well within the words "resulting from . . . inherent . . . quality or vice."

I think that the appeal should be dismissed with costs and I move your Lordships accordingly.

I desire to add that my noble and learned friend, Lord Carson, concurs in this opinion and motion.

LORD ATKINSON.—I concur.

LORD WRENBURY.—I concur.

LORD BLANESBURGH.—I am of the same opinion.

Appeal dismissed.

Solicitors for the appellants, *Parker, Garrett, and Co.*

Solicitors for the respondents, *William A. Crump and Son.*

Office-Supreme Court, U.S.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1963

No. 292

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner,

v.

ELMORE & STAHL,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court
of the State of Texas.

BRIEF
OF THE PENNSYLVANIA RAILROAD COMPANY
AS AMICUS CURIAE

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Dated: , 1963

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**BRIEF OF THE PENNSYLVANIA RAILROAD
COMPANY AS AMICUS CURIAE.**

Amicus curiae, The Pennsylvania Railroad Company, respectfully urges that a writ of certiorari be granted in the present case. Counsel for both parties have consented to the filing of this brief of amicus curiae.

1. The interest of amicus curiae in the present case arises from the fact that it is a connecting carrier with Petitioner and with other carriers to whom perishable agricultural commodities are delivered for shipment in interstate commerce. An action for damages to property

allegedly caused by a carrier while the goods are in transit may be brought against the originating carrier or any connecting carrier (49 U.S.C. § 20(11)). Under freight claim rules and regulations which govern the allocation of liability among carriers, *amicus curiae* may be required, in circumstances similar to those presented by the instant case, to bear a portion of any judgment entered against the originating carrier and to share in the costs of litigation. During the five year period 1958-1962, *amicus curiae* paid a total of \$6,005,924 in satisfaction of claims for carload loss and damage to fresh fruits, melons, and vegetables, and frozen fruits and vegetables. In 1962, the sum paid in connection with such claims was \$1,049,821. *Amicus curiae* thus has a direct interest in the law governing the liability of carriers for spoilage and decay to perishable goods.

2. The instant case presents a question of substantial public importance: Is a railroad common carrier under the Uniform Straight Bill of Lading liable for spoilage and decay to perishable commodities notwithstanding a jury finding of due care on the part of the carrier? The ruling of the court below holding the carrier liable despite a jury determination that it was not negligent, appears to be in direct conflict with a decision by the Court of Appeals for the Ninth Circuit in *Larry's Sandwiches Inc. v. Pacific Elec. R.R.*, No. 18,265, June 3, 1963, and a decision by the Court of Appeals for the Fifth Circuit in *Trautmann Bros. Co. v. Missouri Pacific R.R.*, 312 F.2d 102 (1962). The lower court's ruling is likewise contrary to the weight of authority on this point. See e.g., *Southern Pac. Co. v. Itule*, 51 Ariz. 25, 74 P.2d 38 (1937); *Atlantic Coast Line R.R. v. Georgia Packing Co.*, 164 F.2d 1 (5th Cir. 1947).

3. *Amicus curiae* respectfully submits that it should be made clear by this court that in a case involving spoilage and decay of perishable commodities transported in

interstate commerce, a complete defense under the federal common law is established by jury findings that all transportation services covered by the Bill of Lading were performed without negligence and in conformity with the shipper's instructions, and that all matters not covered by the Bill or the shipper's instructions were likewise prudently performed.

Respectfully submitted,

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IN THE
Supreme Court of the United States
October Term, 1963

No. 292

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner

v.

ELMORE & STAHL, Respondent

ON PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of The State of Texas

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INDEX

STATEMENT	Page 1
ARGUMENT	2
CONCLUSION	4
APPENDIX	
A. Findings of Fact of the District Court in Trautmann Bros. Co. v. Missouri Pacific Railroad Co.	5

CITATIONS

Commercial Molasses Corp. v. New York Tank Barge Corp., 314 U.S. 104	3
Missouri Pacific Railroad Co. v. Elmore & Stahl, 360 S.W.2d 839, 841	2
Southern Ry. Co. v. Prescott, 240 U.S. 632	3
Thompson v. James G. McCarrick Co., Inc., 205 F.2d 897 (1953)	3
Trautmann Bros. Co. v. Missouri Pacific R. Co., 312 F.2d 102	2

IN THE
Supreme Court of the United States

October Term, 1963

No. 292

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner

v.
ELMORE & STAHL, *Respondent*

**BRIEF FOR THE RESPONDENT
IN OPPOSITION**

Respondent, Elmore & Stahl, says that a writ of certiorari should be denied because: First, the State Court decision is not in conflict with a recent decision by the Court of Appeals for the Fifth Circuit; Second, the decision of the Supreme Court of Texas was decided in accordance with all of the applicable decisions of this Court.

STATEMENT

In response to special issues submitted by the court a Cameron County, Texas, jury found that the melons were

in good condition at the time respondent delivered them to the carrier at origin and in a damaged condition at destination. Petitioner had pled and offered evidence to the effect that the damage was due to an inherent vice existing in the melons when received and also due to the act or default of the shipper. The jury found that the damage was not due solely to an inherent vice nor to an act or default of the shipper. *Missouri Pacific Railroad Co. v. Elmore & Stahl*, 360 S.W. 2d 839, 841.

In a non-jury case, the trial judge in *Trautmann Bros. Co. v. Missouri Pacific RR Co.*, 312 F. 2d 102, found that the damage at destination was due to an inherent vice in the melons at origin and to the act of the shipper in failing to replenish the ice in the car prior to its departure.

Petitioner does not agree with the latter statement. Petitioner's Brief, footnote p. 8. The District Court's conclusions of law in the *Trautmann Bros.* case are set out in the Appendix of petitioner's brief at p. 30a. The Court's findings of fact are set forth in Appendix to this brief, p. 5, *infra*.

ARGUMENT

No conflict exists between the decision of the Court below and the decision in the *Trautmann Bros.* case. In the instant case had the jury found that the damaged condition was due to inherent vice or fault of shipper, the lower Court would have properly entered a judgment for the defendant carrier. In affirming, the Supreme Court of Texas did not decide a federal question in conflict with the Fifth Circuit but, on the contrary, based its decision solely on Federal Court cases.

The Court of Appeals for the Fifth Circuit in a suit brought to recover for damages to interstate shipments of tomatoes, *Thompson v. James G. McCarrick Co., Inc.*, 205 F. 2d 897 (1953) stated:

"In an action brought under the Carmack Amendment, 49 U.S.C.A. Section 20 (11), all the shipper and holder of a bill of lading is required to do to establish a prima facie case is to show delivery in good condition, arrival in damaged condition, and the amount of his damages whereupon the burden shifts to the carrier to show the cause of damage and that it is not liable therefor."

Neither the opinion of the State Court nor the cases of this Court cited by both the Court of Civil Appeals and the Supreme Court of Texas impose upon interstate carriers an unreasonable degree of responsibility.

The Interstate Commerce Commission in 1918 prescribed the present form for bills of lading. Cf. 52 ICC Rep. 671, December, 1918-April, 1919. The opinion sets out the various statutes passed by Congress to prevent abuses, stating (p. 672) that the carrier is now regarded as an insurer. The Commission (p. 740) declined to prescribe a special form for perishable produce, believing "that the uniform bills prescribed will be adequate to care for any peculiar requirements for such traffic."

Petitioner's contention, if upheld, would hold a common carrier of perishable commodities to the same or even a lesser degree of responsibility than that of a warehouseman or a private carrier. *Southern Ry. Co. v. Prescott*, 240 U.S. 632, *Commercial Molasses Corp. v. New York Tank Barge Corp.*, 314 U.S. 104.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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August, 1963.

APPENDIX

A. Findings of Fact of the District Court in *Trautmann Bros. Co. v. Missouri Pacific Railroad Company*.

"THE COURT:

* * * I am talking now and giving my decision. * * * I am telling you what I think the evidence shows. Mr. Delgallado didn't help me any because he didn't tell me, "I called him and told him that on this car 5976 the ice was this low, and they told me not to put any in." If that evidence was in here, I would then charge the railroad with the responsibility of going out there and finding out why that ice was low. Then it became their duty to impose this tariff, by law, on Trautmann. You all be careful in the future, because this business of coming in here and telling me that you didn't know—there is no evidence here that you know, but if I know that any railroad agent knows what is going on and that that car leaves there without the proper amount of ice, I am going to hold the railroad responsible and negligent, see. But I don't have that evidence here before me. The evidence here before me is that they ordered this car out there. And the evidence before me is that Mr. Fillpot¹ still had work to do on that car. He even opened it sometimes, and if it needed more gas, he gassed it there at the ice dock, and then he connected the fans, and all that. So I think that the whole trouble here has been that Mr. Fillpot was involved in this thing. It is too bad that he couldn't do the job he was supposed to do at the Trautmann shed. Then when everything was pre-cooled, and everything else, turned the car over to the railroad. "here it is." So I think he is the nigger in the woodpile.

¹ Mr. Fillpot was an employee of Trautmann Brothers.

These are my findings, gentlemen, findings of fact, first. I find, from the evidence before me, that the temperature of keeping honeydew melons refrigerated for transportation is from 45 to 50 degrees, as shown by the Department of Agriculture publication. I find that all of the cars reached their destination in Philadelphia within that range, both in top and bottom temperatures. There being no evidence before me that these temperatures changed anywhere down the line during the transportation, I have to assume that they were kept under that type of refrigeration.

I find that the railroad complied with its duty to ice these cars at the regular icing stations. I find that the railroad cars involved here left Laredo with the bunkers not full, but I also find that that was because the shipper, or the plaintiff in this case, had people working in the car, pre-cooling this car, without a proper notification or knowledge on the part of the railroad that such was the case; and that, therefore, the railroad had no duty to either inspect the car or to re-ice it before it departed the point of origin, which was Laredo, Texas.

I further find that the evidence here shows that the production of honeydew melons in the Laredo area, for sale and for picking during the months of August and September of 1957, was a new venture, and that it has not been continued since. I find that out of 52 shipments made over the Missouri Pacific Lines, of Laredo melons, that 49 claims have been filed for decay and overripeness. I therefore find that the melons that were grown in the Laredo area during the season involved here, 1957, had inherent vice in them. I find, therefore, as a matter of law, that the shipper has not discharged its burden of

proof. I find that the railroad has exonerated itself, as a matter of law, of any negligence and of any failure to comply with the instructions of the shipper; and on those phases of the movement that the shipper did not give instructions, that they have proven that they were not negligent.

I find that the decay and overripeness or the bad condition of the melons on arrival in Philadelphia, which was then different from the condition they were in at the point of origin, was due to an inherent vice in the melons themselves." Transcript of Record—Volume III, p. 695-698.

ADDITIONAL FINDINGS OF FACT

XIII.

Fillpot operated the car fans for a period of about eight hours. This was without authority from or knowledge of the defendant, but was under authority from and with the knowledge of plaintiff and its employees having charge of these shipments.

XIV.

Had Fillpot not operated the car fans with the auxiliary motors, the rate of the ice meltage would not made it desirable or necessary that the ice in the bunkers of the cars be replenished before the cars departed Laredo, but with the increased rate of ice meltage resulting from Fillpot's operation of the car fans, it was desirable that the ice in the bunkers be replenished before the cars were switched from the ice dock.

XV.

If the defendant had known that the car fans were operated as above detailed by Fillpot, it would have communicated with the plaintiff and advised it that plaintiff should either re-ice the cars or should pay the defendant an additional charge to cover the increased ice meltage and in either event to put on the bill of lading an appropriate notation of which of the actions was to be taken.

XVI.

If the defendant had known of the cooling operations of Fillpot and that plaintiff had not replenished the ice in the bunkers, defendant would have re-iced the cars before switching them from the ice company's dock.
Transcript of Record, Volume III, pg. 723-724.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1963

No. 292

MISSOURI PACIFIC RAILROAD COMPANY, *Petitioner*,

v.

ELMORE & STAHL, *Respondent*.

Petition For a Writ of Certiorari to the Supreme Court
of the State of Texas

PETITIONER'S REPLY BRIEF

1. Respondent contends that "No conflict exists between the decision of the Court below and the decision [of the Court of Appeals] in the *Trautmann Bros.*

case." (Resp. Br. p. 2.) Respondent's attempt to explain away the conflict will not withstand careful scrutiny.

First, it is incontestable that both the district court and the Court of Appeals in *Trautmann* entertained a view opposite from that of the Texas Supreme Court in the present case with respect to the legal principle which governs the liability of a common carrier for spoilage to perishables. The district court in *Trautmann* stated:

"When a shipment of a perishable commodity like honeydew melons arrives at a destination showing damage and the carriers show that they handled the shipment in the manner specified by the shipper and that they exercised reasonable care to prevent damage from any cause not necessarily involved in the method of transportation so chosen by the shipper, the carriers have established a defense to the shipper's action for damages." (Conclusions of Law of the District Court in *Trautmann Bros. Co. v. Missouri Pacific Railroad Co.*, Para. IV, set out in Appendix to Petition, p. 30a.)

The Court of Appeals stated (App. to Pet., pp. 27a-28a):

"A common carrier is not absolutely liable for spoilage or physical deterioration during the course of shipment. So long as the carrier has discharged its duty of reasonable care, it is not liable for 'damage to a shipment caused . . . by the operation of natural laws upon it . . .'"

On the other hand, the lower court in the instant case held that the "carrier may not exonerate itself by

showing that all transportation services were performed without negligence." (App. to Pet., p. 6a.)¹.

Second, respondent argues that in *Trautmann* the trial court found that the spoilage of the shipment of melons was due to an inherent vice in the fruit, whereas in the present case "the jury found that the damage was not due solely to an inherent vice" (Resp. Br. p. 2).² In *Trautmann*, the district court felt that since a large number of complaints had been filed with respect to the decay of melons during that season in that locale, the shipper was required to prove that the particular shipment of melons involved did not suffer from an inherent vice (Resp. Br. pp. 6-7). The district court held "as a matter of law, that the shipper had not discharged its burden of proof" in this respect (*Ibid.*). In short, the ruling of the trial court in *Trautmann* as to inherent vice was not based on any affirmative evidence as to defect in a particular shipment, but was a conclusion of law which flowed from

¹ The district judge in *Trautmann* stated that "The rules of law announced by the Supreme Court of Arizona in *Southern Pacific Company v. Itule*, 74 P.2d 38, 115 A.L.R. 1268, apply to these interstate shipments of perishables." (App. to Pet., p. 30a.) The lower court in this case, however, declined to follow the *Itule* doctrine (*Id.* at p. 8a). See Petition, pp. 10-11.

² Respondent's statement concerning the jury finding in the present case is incorrect. The jury was asked (Tr. p. 19): "Do you find from a preponderance of the evidence that the worsened condition, if any, of the honeydew melons . . . at the time of their delivery at Chicago . . . was due solely to an inherent vice . . . existing at the time the melons were received by the carrier . . . ?" The jury answered this question in the negative. As we have noted (Petition, p. 5 n. 3), under Texas law a negative answer to a special instruction does not constitute an affirmative finding; it means only that the point was not established by a preponderance of the evidence.

the rules as to the burden of proof which the court thought applicable.

The significant factor, however, is that the Court of Appeals deemed the controversy as to inherent vice immaterial. In ruling that the carrier was not liable, Judge Hutcheson stated: "Even if it is true, as appellant contends, that the district court's finding of inherent vice was based upon improper inferences from general conditions at Laredo, the evidence is nevertheless ample to support the judge's additional finding that *the defendant was not negligent and hence did not contribute to the spoilage.*" (App. to Pet. p. 29a) (emphasis supplied).³

In brief, the district court's conclusion of law as to inherent vice in *Trautmann* and the jury's response to the instruction in this case (note 2, *supra*) do not affect the central issue presented: Is a common carrier liable at common law under a uniform straight bill of lading for spoilage to perishables in transit notwithstanding a finding that the carrier "was not negligent and hence did not contribute to the spoilage?" There is a square conflict as to that fundamental issue between the lower court and the Fifth Circuit.

³ Respondent's reliance (Resp. Br. p. 3) upon *Thompson v. James G. McCarrick Co. Inc.*, 205 F.2d 897 (5th Cir. 1953) is misplaced. In that case, the "only" question was "whether the written instrument filed constituted a valid claim" under the bill of lading (*Id.* at 899).

In addition to *Trautmann Bros.*, the view of the Fifth Circuit respecting the carrier's liability for spoilage to perishables is delineated in *Atlantic Coast Line R.R. v. Georgia Packing Co.*, 164 F.2d 1 (5th Cir. 1947), where the Court stated that the perishable protective tariff rules "limit the liability of a carrier transporting perishable goods to liability for negligent failure reasonably to carry out instructions given by the shipper." (164 F.2d, at 3.)

2. Respondent makes no attempt whatever to distinguish the opinion of the Court of Appeals for the Ninth Circuit in *Larry's Sandwiches, Inc. v. Pacific Elec. R.R.*, No. 18,265 (9th Cir. June 3, 1963), [reprinted in App. to Pet. p. 33a]. We submit that case is directly in conflict with the ruling of the lower court here and constitutes an additional ground for granting the writ.

3. Petitioner's position is that, in a case of spoilage or decay of perishable commodities—if a *prima facie* case is first established by the shipper—the carrier must show, in order to be exonerated, that it carried out the shipper's instructions and performed all its other duties in a reasonably prudent manner.⁴ When that burden has been discharged, as in the case at bar, the carrier is not liable if a perishable commodity decays in transit. That is the thrust of the decisions of the Courts of Appeals in *Trautmann Bros.* and *Larry's Sandwiches Inc., supra*. The lower court in this case held exactly to the contrary. There can be no doubt that under these conflicting de-

⁴ Respondent is mistaken in suggesting that under this rule a common carrier would be held to "a lesser degree of responsibility than . . . a warehouseman or a private carrier." (Resp. Br. p. 3.) A cold storage warehouseman is not an insurer of perishables; he is required to exercise due care. See e.g., *Brace v. Salem Cold Storage Inc.*, — W. Va. —, 118 S.E. 2d 799 (1961). The liability of private carriers does not afford a parallel since such carriers and shippers are "free to regulate their mutual rights and obligations by private arrangements suited to the special circumstances . . ." *Commercial Molasses Corp. v. New York Tank Barge Corp.*, 314 U.S. 104, 110 (1941).

The 1918 Interstate Commerce Commission proceedings with respect to bills of lading do not aid Respondent (Br. p. 3). There was no intent that the common law evolution of the law governing the rights of shippers and carriers should be frozen as of that date.

cisions the liability of a railroad in Texas for the decay of perishable products will depend on whether the suit is tried in a state or federal court. Certainly, the resolution of this conflict presents a valid and persuasive reason for the grant of certiorari.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1963

No. 292

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner,

v.

ELMORE & STAHL,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE
SUPREME COURT OF THE STATE OF TEXAS**

**BRIEF OF THE ATCHISON, TOPEKA AND
SANTA FE RAILWAY COMPANY, GULF,
COLORADO AND SANTA FE RAILWAY
COMPANY AND PANHANDLE AND SANTA FE
RAILWAY COMPANY, AS AMICUS CURIAE.**

The Atchison, Topeka and Santa Fe Railway Company, Gulf, Colorado and Santa Fe Railway Company and Panhandle and Santa Fe Railway Company, comprising the Santa Fe Railway System Lines, as amicus, respectfully urge that the petition for a Writ of Certiorari be granted in the instant case. Counsel for both parties have consented to the filing of this brief amicus curiae.

1. The Santa Fe Railway System Lines, operating from Chicago on the East to the California Coast on

the West, and to the Texas Coast on the South, consists of the three companies herein named, The Atchison, Topeka and Santa Fe Railway Company, Gulf, Colorado and Santa Fe Railway Company and Panchhandle and Santa Fe Railway Company. In shipments of perishable agricultural commodities, delivered for shipment in interstate commerce, one or more of the lines appearing as amicus herein is a connecting carrier with Petitioner, and with other carriers, to whom such perishable commodities are delivered for shipment, and the interest of amicus in this case arises from that fact. Under 49 U. S. C. § 20(11), the originating carrier or any connecting carrier may be the named defendant in an action for damages to property allegedly caused by the carrier while the goods are in transit. Under freight claim rules and regulations governing the allocation of liability among carriers, Amicus may be required, in circumstances similar to those presented in the instant case, to bear a portion of any judgment entered against the originating carrier and to share in the cost of litigation. In 1962 Amicus paid a net amount of \$781,244.00 (total gross payment, less salvage, less amount prorated to other carriers, plus amounts paid to other carriers for Santa Fe's proportion of their claim payments), in satisfaction of claims for carload loss and damage to fresh fruits, melons and vegetables, and frozen fruits and vegetables, and for the five years, 1958-1962, Amicus paid a total of \$4,044,064.00 net in respect to such claims. Therefore, Amicus has a very direct interest in the law governing the liability of carriers for spoilage and decay to perishable goods.

2. The Petition presents a question of substantial

public importance: In the case of perishable commodities transported pursuant to a uniform straight bill of lading, is a common carrier liable at common law for spoilage and decay to such commodities notwithstanding a jury finding that all transportation services were performed by the carrier with due care? The carrier was held liable in the court below, in the face of and despite a jury finding that the carrier was not negligent. Such ruling is in direct conflict with the decision in **Trautmann Bros. Co. vs. Missouri Pacific R. R.**, 312 F. 2d 102 (1962) by the Court of Appeals for the Fifth Circuit, and with a decision of the Court of Appeals for the Ninth Circuit handed down June 3, 1963, in **Larry's Sandwiches Inc. vs. Pacific Electric Railroad**, No. 18,265. The weight of authority on this point, as expressed in **Southern Pacific Company vs. Itule**, 51 Ariz. 25, 74 Pac. 2d 38 (1937) is likewise contrary to the ruling of the lower court in the instant case.

3. Amicus respectfully submits that it should be clearly settled by this court that a common carrier is not liable for the physical deterioration of perishable commodities during the course of interstate shipments, if the carrier has exercised due care and has faithfully complied with the shipper's instructions. As the House of Lords stated with reference to the liability of a water carrier in **F. O. Bradley & Sons, Limited v. Federal Steam Navigation Co. Ltd.**, 137 Law Times Rep. 266 (House of Lords 1927), quoted Petition, p. 52a:

"When the common law makes the ship bear the risks of the voyage and of all that may happen to the cargo in the course of it, but

excepts the act of God, the King's enemies and inherent vice, the scheme is evident. The act of God and the King's enemies neither party can wholly guard against, so the loss lies where it falls. For the rest, the carrier answers for his ship and men, the cargo-owner for his cargo. The carrier has at least some means of controlling his crew and has full opportunity of making his ship seaworthy, but of the cargo he knows little or nothing and, as the shipper has the advantage over him in this respect, he must bear the risks belonging to the cargo."

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1963

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MISSOURI PACIFIC RAILROAD COMPANY, Petitioner,

v.

ELMORE & STAHL, Respondent.

On Writ of Certiorari to the Supreme Court of Texas

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January 1964

Printed at Bureau of Printing, Washington, D. C.

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATUTE INVOLVED	2
STATEMENT	3
SUMMARY OF ARGUMENT	6
ARGUMENT	9
A. The Carrier Is Not Liable for Spoilage of Perish- ables Under the Federal Common Law as Ap- plied Under the Interstate Commerce Act	10
B. The Bill of Lading Exempts the Carrier, Absent Negligence, for Loss Arising from the Inherent Vice or Nature of the Goods	17
C. The Carrier Is Not Liable for Damage in the Form of Spoilage Under the Provisions of the Perishable Protective Tariff Applicable to the Shipment Here	20
CONCLUSION	24
APPENDIX	25

CITATIONS

CASES:

Adams Express Co. v. Croninger, 226 U.S. 491 (1913)	11
Atlantic Coast Line R.R. v. Georgia Packing Co., 164 F.2d 1 (5th Cir. 1947)	18, 21
Austin v. Seaboard Air Line R.R., 188 F.2d 239 (5th Cir. 1951)	13, 14
Cassone v. New York, N.H. & H. R.R., 100 Conn. 262, 123 Atl. 280 (1924)	13
Chesapeake & O. Ry. v. Gilbert, 83 A.2d 327 (D.C. Munic. Ct. App. 1951)	13
Chesapeake & O. Ry. v. Martin, 283 U.S. 209 (1931)	9
Coggs v. Bernard, 2 Ld. Raym. 909, 92 Eng. Rep. 107 (Q.B. 1707)	10

	Page
Compania de Vapori Inasco v. Missouri Pac. R.R., 232 F.2d 657 (5th Cir.), cert. denied, 352 U.S. 880 (1956)	15
Daniels v. Northern Pac. Ry., 88 Ore. 421, 171 Pac. 1178 (1918)	13
Davis v. Cornwell, 264 U.S. 560 (1924)	21
Delphi Frosted Foods Corp. v. Illinois Cent. R.R., 89 F.Supp. 55 (W.D.Ky. 1950), aff'd, 188 F.2d 343 (6th Cir., 1951), cert. denied, 342 U.S. 833 (1951) 13, 18, 21	21
F. O. Bradley & Sons Ltd. v. Federal Steam Naviga- tion Co. Ltd., 137 Law Times Rep. 266 (H.L. 1927)	11, 12, 18
Farris Bros. & Co. v. Pennsylvania R.R., 98 Pa. Su- perior Ct. 128 (1930)	13
Frye v. Railway Express Agency, Inc., 41 Tenn. App. 429, 296 S.W.2d 362 (1955)	13
Galveston Wharf Co. v. Galveston, H. & S.A. Ry., 285 U.S. 127 (1932)	9
Gulf States Utilities Co. v. Grubbs, 44 S.W.2d 1001 (Tex. Civ. App. 1932)	5
Hafer v. St. Louis S.W. Ry., 101 Ark. 310, 142 S.W. 176 (1911)	12
Hamilton Foods, Inc., v. Atchison, T.&S.F. Ry., 83 F. Supp. 478 (S.D. Cal. 1948), aff'd, 173 F.2d 573 (9th Cir. 1949), cert. denied, 337 U.S. 917 (1949) 13, 21	13, 21
Howe v. Great No. Ry., 176 Minn. 46, 222 N.W. 290 (1928)	13
Illinois Cent. R.R. v. H. Rouw Co., 25 Tenn. App. 475, 159 S.W.2d 839 (1940)	13
Larry's Sandwiches, Inc. v. Pacific Elec. Ry., 318 F.2d 690 (9th Cir. 1963)	13, 14, 18, 21
Missouri Pac. R.R. v. H. Rouw Co., 202 Ark. 1139, 155 S.W.2d 693 (1941)	13
Morris v. Texas & N.O.R.R., 269 S.W.2d 565 (Tex. Civ. App. 1954)	5
Pennsylvania R.R. v. Greene, 173 F.Supp. 657 (S.D. Ala. 1959)	9, 17, 21
Railway Express Agency, Inc. v. H. Rouw Co., 197 Ark. 1142, 127 S.W.2d 251 (1939)	13
Railway Express Agency, Inc. v. Shull, 224 Ark. 476, 275 S.W.2d 882 (1955)	13

Index Continued

iii

	Page
Reider v. Thompson, 116 F.Supp. 279 (E.D. La., 1953)	15
Schnell v. The Vallescura, 293 U.S. 296 (1934)	15
Secretary of Agriculture v. United States, 350 U.S. 162 (1956)	10, 11, 20
Southern Pac. Co. v. Itule, 51 Ariz. 25, 74 P.2d 38 (1937)	12, 13, 15
Southern Ry. v. Prescott, 240 U.S. 632 (1916)	9
Sugar v. National Transit Corp., 82 Ohio App. 439, 81 N.E.2d 609 (1948)	13
Sutton v. Minneapolis & St. L. Ry., 222 Minn. 233, 23 N.W.2d 561 (1946)	13, 21
Texas & Pac. Ry. v. Empacadora de Cuidad Juarez, 309 S.W.2d 926 (Tex. Civ. App. 1957)	14
Trautmann Bros. Co. v. Missouri Pac. R.R., 312 F.2d 102 (5th Cir. 1962)	7, 13, 14, 17, 18, 21
United States v. Reading Co., 289 F.2d 7 (3d Cir. 1961)	11, 17, 18
W. E. Roche Fruit Co. v. Northern Pac. Ry., 184 Wash. 695, 52 P.2d 325 (1935)	13
Watson Bros. Transp. Co. v. Domenico, 118 Colo. 133, 194 P.2d 323 (1948)	13
Watson Bros. Transp. Co. v. Feinberg Kosher Sausage Co., 193 F.2d 283 (8th Cir. 1951)	13
Yeckes-Eichenbaum, Inc. v. Texas Mexican Ry., 263 F.2d 791 (5th Cir.), cert. denied, 361 U.S. 829 (1959)	16

STATUTES AND REGULATIONS:

§ 8(2), Australian Sea-Carriage of Goods Act, Statute No. 14 of 1904	18, 19
Perishable Protective Tariff No. 17	3, 4, 21, 22
28 U.S.C. § 1257(3) (1958)	1
49 U.S.C. § 6(1) (1958)	21
49 U.S.C. § 20(11) (1958)	2

MISCELLANEOUS:

Carver, Carriage of Goods by Sea (10th ed. 1957)	10
Perishable Freight Investigation, 56 I.C.C. 449 (1920)	22
41B Texas Jurisprudence (1953)	5

IN THE
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OCTOBER TERM, 1963

No. 292

MISSOURI PACIFIC RAILROAD COMPANY, *Petitioner,*

v.

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On Writ of Certiorari to the Supreme Court of Texas

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court of Texas (R. 237) is reported at 368 S.W. 2d 99. The opinion of the Texas Court of Civil Appeals (R. 227) is reported at 360 S.W. 2d 839.

JURISDICTION

The judgment of the Supreme Court of Texas was entered on May 15, 1963 (R. 244). A timely motion for rehearing was overruled on June 12, 1963 (R. 246). The petition for certiorari was filed on July 19, 1963, and certiorari was granted on October 14, 1963 (R. 246). The jurisdiction of this Court is conferred by 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. In the case of a shipper's claim for spoilage or decay of perishable commodities transported by a common carrier in interstate commerce pursuant to a Uniform Straight Bill of Lading and subject to the provisions of the Perishable Protective Tariff, does a jury finding that all services covered by the Bill were performed by the carrier without negligence and in full compliance with the shipper's instructions, and were performed in a prudent manner as to matters not covered by the Bill or the shipper's instructions, constitute a complete defense for the carrier?

2. In such a case of a claim for spoilage or decay of perishable commodities, once it is found that the common carrier has performed all services with due care and in compliance with the shipper's instructions, is the carrier entitled as a matter of law to the exemption from liability for damage occasioned by the inherent nature or vice of the goods, as provided under the federal common law and under the Uniform Bill?

STATUTE INVOLVED

The pertinent Act of Congress is the so-called Carmack Amendment of June 29, 1906, 34 Stat. 595, c. 3591, § 7, as amended, 49 U.S.C. § 20(11) (1958) (now constituting § 20(11) of the Interstate Commerce Act). The statute reads in relevant part:

"Any common carrier . . . receiving property for transportation from a point in one State . . . to a point in another State . . . shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier . . . to which such property may

be delivered or over whose line or lines such property may pass . . ."

Rules 130 and 135 of Perishable Protective Tariff No. 17 are set forth in the Appendix, *infra*, p. 25.

STATEMENT

Respondent Elmore & Stahl, fruit shippers, instituted suit in a Texas state court against petitioner, a common carrier, to recover damages for deterioration of an interstate shipment of perishable honeydew melons (R. 1, 6).¹ Petitioner transported for respondent 640 crates of melons from Rio Grande City, Texas, to Chicago in a refrigerator car under a Uniform Straight Bill of Lading.² The Bill provides, in pertinent part, that the carrier "shall be liable as at common law" for any loss or damage to the goods (Section 1(a), R. 158).³ The Bill further provides that "Except in case of negligence of the carrier . . . (and the burden to prove freedom from such negligence shall be on the carrier . . .) the carrier . . . shall not be liable for loss . . . resulting from a defect or vice in the property . . ." (Section 1(b), R. 158.)

¹ The complaint (R. 6) contained four independent counts, each stating a separate claim for damage to a different shipment of perishables. As the Texas Court of Civil Appeals stated, "[E]ach of these counts, in effect, is a separate lawsuit" (R. 228). The shipment involved here is solely that covered by Count 1, which related to the movement of Car ART 35042 from Rio Grande City to Chicago (R. 6, 238). The trial court's judgment for plaintiff on Count 1 was affirmed by the Court of Civil Appeals and subsequently by the Texas Supreme Court (R. 235, 245). A judgment for plaintiff on the different shipments involved in the other three counts was reversed by the Court of Civil Appeals, and no review was had in the Texas Supreme Court (*Ibid.*).

² The Bill of Lading is reproduced in the record at R. 157 et seq.

Pursuant to respondent's request, petitioner undertook to furnish certain protective services for the melons in transit, namely "standard refrigeration to destination."³ The carrier's responsibility with respect to these services is governed by Rules 130 and 135 of Perishable Protective Tariff No. 17 (set out in the Appendix, p. 25, *infra*). The tariff—incorporated by reference in the Bill of Lading—states that "carriers furnishing protective service as provided herein do not undertake to overcome the inherent tendency of perishable goods to deteriorate or decay, but merely to retard such deterioration or decay insofar as may be accomplished by reasonable protective service, of the kind and extent requested by the shipper, performed without negligence."

Some of the melons deteriorated in transit;⁴ it was undisputed that this deterioration was the result of spoilage and decay. There was no evidence of any specific act of negligence by the carrier.⁵ In response to special issues submitted to them at trial, the jury affirmatively found that "defendant, and its connecting carriers, performed without negligence the trans-

³ An expert witness at the trial explained that "'standard refrigeration to destination' . . . means that the car will be reiced to capacity at all regular icing stations" (R. 90).

⁴ The melons were inspected at destination by the Department of Agriculture. The "Inspection Certificate" (Pl. Ex. 5, R. 173) stated that the damage "average[d] approximately 15%" and that the melons could not be graded as "US No. 1 only [on] account [of] discoloration and decay."

⁵ The jury found in effect that respondent had made out a so-called "prima facie" case by finding in substance that the melons were in good condition at the time the Bill of Lading was signed, but in damaged condition upon arrival (Answers to Special Issues Nos. 1 and 2, R. 176).

portation services as provided by the terms and conditions of the bill of lading and as instructed by the plaintiff and in a reasonably prudent manner as to matters not covered by the bill of lading or plaintiff's instructions" (Ans. to Special Issue No. 3, R. 177). The burden of proof as to this matter had been placed on the carrier. Although the case involved perishables which had decayed, the trial court nevertheless submitted to the jury as a separate issue the question whether the worsened condition of the melons upon arrival "was due solely to an inherent vice . . . existing at the time the melons were received by the carrier at Rio Grande City, Texas, for transportation" (Special Issue No. 6, R. 178). The jury answered this question in the negative.⁶

On the basis of the special findings, the trial judge entered judgment for damages against petitioner (R. 199). This ruling was affirmed on appeal by the Texas Court of Civil Appeals (R. 227, 235).

After granting a writ of error, the Texas Supreme Court affirmed the judgment. The Court ruled that where a claim is made for spoilage and decay of perishables "the carrier may not exonerate itself by showing that all transportation services were performed without negligence but must go further and establish that the loss or damage was caused by one of the four excepted perils recognized at common law" (R. 237).

⁶ Under Texas law and practice, the failure of a jury to find the affirmative of a special issue submitted to it does not constitute an affirmative finding to the contrary. See *Morris v. Texas & N.O.R.R.*, 269 S.W. 2d 565, 569, 572 (Tex. Civ. App. 1954); *Gulf States Utilities Co. v. Grubbs*, 44 S.W. 2d 1001, 1002 (Tex. Civ. App. 1932); 41B Texas Jurisprudence (1953), p. 780. See note 15, *infra*.

The Court below acknowledged that a number of courts have held that a carrier is not liable for spoilage of perishables unless it is negligent (R. 239). The Court below refused, however, to follow these authorities. It declined to recognize any special principle applicable to perishable goods, and it held that a carrier is absolutely responsible for the spoilage of perishables although "all transportation services were performed without negligence" (R. 237). The Court also held that despite the fact that the case was unquestionably one of the spoilage of perishable commodities, and was one where the carrier had shown its freedom from fault, the case was not one which came under the exception in the Bill of Lading for losses due to a "vice in the property." (R. 243).

SUMMARY OF ARGUMENT

The basic point on which this case turns is that a common carrier of an interstate shipment of perishable commodities is not liable for damage in the form of spoilage and decay where the carrier has exercised due and reasonable care as to the shipment and has complied with the shipper's instructions. Here a jury expressly found that petitioner had borne the burden of showing that it had exercised reasonable care to prevent spoilage and that it had complied with the shipper's instructions. Accordingly, the carrier is absolved from liability in these circumstances (i) by the federal common law under the Interstate Commerce Act, (ii) by the express terms of the Bill of Lading, and (iii) by the relevant tariff provisions.

1. Under the federal common law, as applied under the Interstate Commerce Act, the carrier's responsibility as to goods being carried does not extend to

losses connected with the nature of the goods themselves. Thus a carrier is not liable for damage occasioned by the inherent nature of the goods, in the absence of negligence on the carrier's part.

This general principle has various specific applications. One application is to the case of loss arising from injury to livestock in transit. Another application uniformly made in the lower federal courts embraces the matter at bar—the case of loss or damage in the nature of spoilage or decay of perishable fruits and vegetables. With the exception of the case at bar, the modern cases uniformly hold that a common carrier is not liable for the spoilage and decay of perishable fruits and vegetables, absent negligence on the part of the carrier. As recently expressed by the Court of Appeals for the Fifth Circuit: “A common carrier is not absolutely liable for spoilage or physical deterioration during the course of shipment. So long as the carrier has discharged its duty of reasonable care, it is not liable for ‘damage to a shipment caused . . . by the operation of natural laws upon it . . .’” *Trautmann Bros. Co. v. Missouri Pac. R.R.*, 312 F. 2d 102, 104 (5th Cir. 1962).

This rule makes a fair allocation of responsibilities. The shipper may readily establish a prima facie case, and then the carrier must come forward and affirmatively show its freedom from negligence and its compliance with the shipper's instructions, as was done here. The contrary rule would unfairly make a carrier a guarantor that perishable goods will not decay in transit.

2. The express terms of the Bill of Lading—the shipping contract—provides that, absent negligence,

the carrier is not accountable for loss or damage "resulting from a defect or vice in the property." This provision, properly construed, embraces the natural tendency of perishable fruits and vegetables to become overripe, spoil and decay. There was no need for the carrier to show that there was some peculiar unfitness present in the melons in question. The implication in the opinions of courts below that this was necessary is unique and incorrect, flying in the face of the settled law on the point.

3. The parties agreed in the Bill that the shipment was subject to the appropriate tariffs. The Perishable Protective Tariff, applicable to the shipment in question, likewise confirms that the carrier is not liable for the spoilage and decay of the melons, where the carrier has performed its duties without negligence, and in accordance with the shipper's instructions. The Federal cases unbrokenly support this interpretation.

The tariff makes it clear that a carrier moving perishable commodities and furnishing protective services for them, as was the case here, "does not undertake to overcome the inherent tendency of perishable goods to deteriorate or decay, but merely to retard such deterioration or decay insofar as may be accomplished by reasonable protective services . . . performed without negligence." Whether the tariff be viewed as itself setting the standard of liability, or simply reflecting the common law rule, it is evident here that as to the spoilage and decay claim of the shipper, the carrier was not liable, inasmuch as it bore the burden of showing its compliance with the shipper's instructions and its freedom from negligence.

ARGUMENT

The basic, single proposition upon which this case turns is this: A common carrier is not liable for spoilage and decay of an interstate shipment of perishable commodities when it bears the burden of showing that it has exercised reasonable care as to the shipment and has complied with the instructions of the shipper.

The jury in the present case specifically found in response to special interrogatories that petitioner was not negligent and that it had faithfully followed the shipper's instructions (Answer to Special Issue No. 3, R. 177). As we shall discuss, this finding constitutes a complete defense to a claim based upon spoilage and decay of perishable commodities. The carrier is absolved in these circumstances (i) by the federal common law, as applied under the Interstate Commerce Act, (ii) by the understanding of the parties, as reflected in the Bill of Lading, and (iii) under the provisions of a special tariff applicable to perishable commodities.

¹ The Court below recognized that, "the liability of a carrier, for damage to an interstate shipment is a matter of Federal law to be determined by the Federal statutes and decisions." (R. 239). "The rights and liabilities of the parties are governed by the acts of Congress, the bill of lading, and the tariffs duly filed with the Interstate Commerce Commission. The bill of lading and the tariff have the force of a statute." *Pennsylvania R.R. v. Greene*, 173 F. Supp. 657, 659 (S.D. Ala. 1959). See also *Galveston Wharf Co. v. Galveston, H. & S. A. Ry.*, 285 U.S. 127, 134-35 (1932); *Chesapeake & O. Ry. v. Martin*, 283 U.S. 209, 212-13 (1931); *Southern Ry. v. Prescott*, 240 U.S. 632, 636 (1916).

A. The Carrier Is Not Liable for Spoilage of Perishables Under the Federal Common Law as Applied Under the Interstate Commerce Act

1. The Bill of Lading under which the melons were shipped recites that "The carrier . . . shall be liable as at common law for any loss . . . or damage . . . except as hereinafter provided." (Section 1(a), R. 158).

The earliest common law cases spoke of a common carrier's liability in broad, undifferentiated terms. In the early 18th Century, Chief Justice Holt was able to say that a common carrier was answerable for any loss or damage to goods entrusted to its care, except for "acts of God, and of the enemies of the King." *Coggs v. Bernard*, 2 Ld. Raym. 909, 92 Eng. Rep. 107, 112 (Q.B. 1707).⁸ However, as the common law developed, three additional exceptions to the carrier's liability were soon recognized: (i) the inherent vice or nature of the commodity; (ii) the fault of the consignor or owner of the goods; and (iii) an act by governmental authority. *Secretary of Agriculture v. United States*, 350 U.S. 162, 165, n. 9 (1956); Carver, *Carriage of Goods by Sea* (10th ed. 1957), p. 14.

By the early years of the 20th Century, the common law had developed a fundamental allocation of responsi-

⁸ The justification given by Chief Justice Holt for this extreme rule was simply that otherwise "carriers might have an opportunity of undoing all persons that had any dealing with them, by combining with thieves, etc., and yet doing it in such a clandestine manner as would not be possible to be discovered." 92 Eng. Rep., at 112. Loss from theft or mysterious disappearance in transit is, of course, under the fundamental allocation of responsibilities imposed by the modern common law (which we discuss below, pp. 11-14), still a matter for which the carrier is absolutely liable.

bility. The carrier's responsibility did not extend to matters connected with the nature of the goods themselves. Although as to certain matters connected with the transportation services the carrier was absolutely liable, "the common law did not impose a liability unrelated to the carrier's conduct." *Secretary of Agriculture v. United States, supra*, at 173 (concurring opinion). Accordingly, under the common law, "a carrier was not liable for damage occasioned by the inherent vice or nature of the goods in the absence of negligence." *United States v. Reading Co.*; 289 F. 2d 7, 9 (3d Cir. 1961).

2. This basic allocation of responsibility established at common law was codified by Section 20(11) of the Interstate Commerce Act, which provides that the carrier shall be liable "for any loss . . . to such property caused by it" *Secretary of Agriculture v. United States, supra*, at 165, n. 9. In construing this provision, this Court said in *Adams Express Co. v. Croninger*, 226 U.S. 491, 506 (1913): "The suggestion that an absolute liability exists for every loss, damage, or injury, from any and every cause, would be to make such a carrier an absolute insurer and liable for unavoidable loss or damage, though due to uncontrollable forces. That this was the intent of Congress is not conceivable. To give such emphasis to the words 'any loss or damage,' would be to ignore the qualifying words, 'caused by it.'"

This fundamental division of responsibility—expressed in a leading English case as "the carrier answers for his ship and men, the cargo-owner for his cargo," *F. O. Bradley & Sons Ltd. v. Federal Steam Navigation Co. Ltd.*, 137 Law Times Rep. 266 (H.L.

1927)*—has been applied in various contexts. One such application is the principle—acknowledged by the Court below (R. 243)—that in the case of loss arising from injury to livestock in transit, the carrier discharges his responsibility when it shows that it has performed the transportation services without negligence. As a leading case puts it, it is generally recognized that “due to the peculiar nature and propensity of animals, the carrier should not be liable for injury thereto, if it ha[s] provided suitable means of transportation and exercised the degree of care which the nature of the property require[s] . . . [Animals] may be injured, or even killed, by acts arising out of their own inherent nature and unaccompanied by any human agency or negligence.” *Southern Pac. Co. v. Itule*, 51 Ariz. 25, 30-31, 74 P. 2d 38, 40-41 (1937). See *Hafer v. St. Louis S.W. Ry.*, 101 Ark. 310, 142 S.W. 176 (1911).

3. Likewise, the large-scale development, in relatively recent years, of long distance transportation of fresh fruits and vegetables in interstate commerce has led to the evolution of an appropriate rule governing the carrier's liability as to the spoilage and decay of such property. This rule is based on the same underlying fundamental allocation of responsibility as the so-called “livestock rule”. The principle that the carrier should not be accountable for “unavoidable loss or damage” arising from the “inherent nature” of the commodity transported has been the basis of decisions by numerous courts absolving the carrier of liability for spoilage and decay to perishables upon proof that

*The *F. O. Bradley & Sons* opinion is reprinted in the Petition for Certiorari, Appendix p. 38a.

the carrier has exercised reasonable care, and has handled the goods in the manner requested by the shipper. *Trautmann Bros. Co. v. Missouri Pac. R.R.*, 312 F. 2d 102 (5th Cir. 1962); *Larry's Sandwiches, Inc. v. Pacific Elec. Ry.*, 318 F. 2d 690 (9th Cir. 1963); *Sutton v. Minneapolis & St. L. Ry.*, 222 Minn. 233, 23 N.W. 2d 561 (1948); *Howe v. Great No. Ry.*, 176 Minn. 46, 222 N.W. 290 (1928); *Missouri Pac. R.R. v. H. Rouw Co.*, 202 Ark. 1139, 155 S.W. 2d 693 (1941); *Railway Express Agency, Inc., v. H. Rouw Co.*, 197 Ark. 1142, 127 S.W. 2d 251 (1939); *Southern Pac. Co. v. Itule*, 51 Ariz. 25, 74 P. 2d 38 (1937); *W. E. Roche Fruit Co. v. Northern Pac. Ry.*, 184 Wash. 695, 52 P. 2d 325 (1935); *Cassone v. New York, N.H. & H. R.R.*, 100 Conn. 262, 123 Atl. 280 (1924); *Daniels v. Northern Pac. Ry.*, 88 Ore. 421, 171 Pac. 1178 (1918); *Farris Bros. & Co. v. Pennsylvania R.R.*, 98 Pa. Superior Ct. 123 (1930); *Austin v. Seaboard Air Line R.R.*, 188 F. 2d 239 (5th Cir. 1951). See also *Watson Bros. Transp. Co. v. Feinberg Kosher Sausage Co.*, 193 F. 2d 283, 285 (8th Cir. 1951); *Delphi Frosted Foods Corp. v. Illinois Cent. R.R.*, 188 F. 2d 343, 346 (6th Cir.), cert. denied, 342 U.S. 833 (1951); *Hamilton Foods, Inc. v. Atchison, Topeka & S.F. Ry.*, 83 F. Supp. 478, 479 (S.D. Cal. 1948), aff'd, 173 F. 2d 573 (9th Cir. 1949), cert. denied, 337 U.S. 917 (1949); *Frye v. Railway Express Agency, Inc.*, 41 Tenn. App. 429, 296 S.W. 2d 362 (1955); *Railway Express Agency, Inc. v. Shull*, 224 Ark. 476, 275 S.W. 2d 882 (1955); *Chesapeake & O. Ry. v. Gilbert*, 83 A. 2d 327 (D.C. Munic. Ct. App. 1951); *Watson Bros. Transp. Co. v. Domenico*, 118 Colo. 133, 194 P. 2d 323 (1948); *Sugar v. National Transit Corp.*, 82 Ohio App. 439, 443, 81 N.E. 2d 609, 611 (1948); *Illinois Cent. R.R. v. H. Rouw Co.*, 25 Tenn.

App. 475, 159 S.W. 2d 839 (1940); *Texas & Pac. Ry. v. Empacadora de Ciudad Juarez*, 309 S.W. 2d 926 (Tex. Civ. App. 1957).

4. This has been the rule uniformly applied in the lower Federal Courts under the federal common law prevailing under the Carmack Amendment. As the Court of Appeals for the Ninth Circuit stated recently, in *Larry's Sandwiches, Inc. v. Pacific Elec. Ry.*, *supra*, at 692: "Upon proof of the perishable nature of the goods the carrier is relieved of its insurer's liability"—and the test is negligence.

The Court of Appeals for the Fifth Circuit—in a statement which the Court below declined to follow—recently phrased the rule applicable to cases of the spoilage and decay of perishables in these words: "A common carrier is not absolutely liable for spoilage or physical deterioration during the course of shipment. So long as the carrier has discharged its duty of reasonable care, it is not liable for 'damage to a shipment caused by the operation of natural laws upon it . . .'" *Trautmann Bros. Co. v. Missouri Pac. R.R.*, *supra*, at 104. See also *Austin v. Seaboard Air Line R.R.*, 188 F. 2d 238 (5th Cir. 1951).

And in a leading and frequently cited case, which the Court below also expressly declined to follow, the Arizona Supreme Court expressed the rationale underlying this rule as follows: "It is a notorious fact, of which the courts may well take judicial notice, that all fruits and vegetables of every nature will ultimately decay, although no human agency has approached them after their maturity. The possibility of damages to this class of goods in shipment, without any negligence on the part of the carrier, is, in our opinion, even

greater than that of damage to livestock . . .” *Southern Pac. Co. v. Itule*, *supra*, 51 Ariz., at 33, 74 P. 2d, at 41.¹⁰

5. This rule—uniformly followed in the lower federal courts, and never dissented from in the modern decisions, apart from the holding of the courts below,¹¹ as far as our research indicates—represents a reasonable and equitable allocation of responsibility between shippers and carriers for loss in the form of spoilage and decay. It is a rule restricted to matters, such as spoilage and decay, connected with the nature of the goods themselves. In the case of loss not arising out of the nature of the goods—such as for example, injury

¹⁰ The Texas Supreme Court below accepted the “livestock rule”, but (contrary to the passage quoted from the *Itule* case) stated that the “so-called livestock rule is based, at least in part, upon considerations which have no application in the case of inanimate perishables.” (R. 243.) The Court quite accurately observed: “We know that honeydew melons do not have the propensities of Brahma cattle, and are not likely to bite each other or kick the slats out of crates.” (*Ibid.*)—On the other hand, it can just as fairly be said that Brahma cattle do not become overripe as rapidly as honeydew melons.—The whole point, which the Texas Supreme Court did not apprehend, is that the common law rules both as to livestock and as to perishable vegetables and fruits are simply applications of the fundamental principle that the carrier’s responsibility does not extend to matters connected with the nature of the goods themselves; regardless of whether this happens to be the tendency of livestock to kick one another or the tendency of melons to rot.

¹¹ The Texas Supreme Court did not refer to any case in which a carrier was held liable for spoilage to perishables notwithstanding a finding of due care and compliance with the shipper’s instructions. The cases cited by the Court below either did not involve perishable commodities, *e.g.*, *Compania de Vapores Inasco v. Missouri Pac. R.R.*, 232 F. 2d 657 (5th Cir.), *cert. denied*, 352 U.S. 850 (1956) (automobiles); *Reider v. Thompson*, 116 F. Supp. 279 (E.D. La. 1953) (sheepskins), or were cases where the carrier was found to have been negligent. *E.g.*, *Schnell v. The Vallescura*, 293 U.S. 296, 306 (1934).

accompanied by breaking of the crates in which vegetables or fruits are shipped—the rule remains that the carrier cannot escape liability by proving its freedom from fault. See *Yeckes-Eichenbaum, Inc. v. Texas Mexican Ry.*, 263 F. 2d 791, 794 (5th Cir.), *cert. denied*, 361 U.S. 827 (1959).¹³

In the administration of the rule consistently applied in the lower federal courts concerning loss through spoilage or decay, the shipper has every possible reasonable protection. The shipper can establish a *prima facie* case of liability, as he did here, simply by showing that the fruit was in good condition at the time of shipment but spoiled upon arrival. Then the burden is upon the carrier to establish that it exercised reasonable precautions to prevent spoilage and had meticulously carried out the shipper's directives. The jury here found that petitioner had made such a showing and had met this burden.

In the case of a claim for spoilage or decay of perishable commodities, we submit that in view of the uniform holdings of the federal courts, based on the common law principles we have set out, this showing is sufficient to establish a defense; and that the rule on which it is based affords the shipper of perishable commodities every protection which the common law gives him. The contrary rule would unfairly make the carrier a guarantor of the condition of commodities by their nature highly perishable, and as to whose properties and preservation requirements the shipper has superior knowledge.

¹³ The Texas Supreme Court expressed surprise at the suggestion that different principles were applicable in the case of breakage of crates as distinguished from spoilage of perishables (R. 242). But this distinction between breakage and spoilage cases is one which is clearly made in the Federal common law, as Judge Hutcheson's opinion in the *Yeckes-Eichenbaum* case, cited in the text, clearly demonstrates.

B. The Bill of Lading Exempts the Carrier, Absent Negligence, for Loss Arising from the Inherent Vice or Nature of the Goods

Not only does the liability of the carrier "at common law" not extend to the spoilage of perishables caused without its fault, but the Bill of Lading recognizes this by providing, in terms, that absent negligence the carrier shall not be accountable for loss or damage "resulting from a defect or vice in the property." (Section 1(b), R. 158). A bill of lading is, of course, "a contract, binding as other contracts upon the parties thereto." *Pennsylvania R.R. v. Greene*, 173 F. Supp. 657, 659 (S.D. Ala. 1959). Accordingly, the contractual understanding of the parties, as reflected by the Bill, was that "the duty imposed on a carrier in handling perishables is to exercise reasonable care" and the carrier is "not liable for damage occasioned by the inherent vice or nature of the goods in the absence of negligence." *United States v. Reading Co.*, 289 F. 2d 7, 9 (3d Cir. 1961).

The Court below apparently labored under a misapprehension of the meaning of this clause in the Bill. It declined to view damage in the nature of spoilage or decay of perishables as a loss arising from the "inherent vice or nature of the goods," absent some form of showing by the carrier that this specific shipment of perishable goods was particularly or peculiarly unfit for the journey. This novel view is contrary to the federal law on the matter.¹³

¹³ *Trautmann Bros. Co. v. Missouri Pac. R.R.*, *supra*, precisely illustrates this. There some evidence had been submitted to the effect that melons grown at Laredo, the place of origination of the shipment involved there, were peculiarly prone to decay. This was contested on appeal, but the Fifth Circuit held the matter irrele-

The established meaning of the clause is that when damage to perishable goods arises through spoilage or decay a case of "damage occasioned by the inherent vice or nature of the goods" is presented, and the carrier may exonerate itself by showing its freedom from fault, as petitioner did here. *United States v. Reading Co.*, *supra*; *Trautmann Bros. Co. v. Missouri Pac. R.R.*, *supra*; *Delphi Frosted Foods Corp. v. Illinois Cent. R.R.*, 89 F. Supp. 55, 58-59 (W.D. Ky. 1950), *aff'd*, 188 F. 2d 343 (6th Cir. 1951), *cert. denied*, 342 U.S. 833 (1951); *Atlantic Coast Line R.R. v. Georgia Packing Co.*, 164 F. 2d 1 (5th Cir. 1947). No showing of peculiar or unusual spoilage tendencies in the perishable commodities is demanded. As the Court of Appeals for the Ninth Circuit put it in its recent decision in *Larry's Sandwiches, Inc. v. Pacific Elec. R.R.*, *supra*, 318 F. 2d, at 692-93, in the case of spoilage and decay to "perishable goods, the burden upon the carrier is not to prove that the damage resulted from the inherent vice of the goods, but to prove its own compliance with the rules of the tariff and the shipper's instructions."

The established construction of the clause is illuminated by the opinion of the House of Lords in *F. O. Bradley & Sons Ltd. v. Federal Steam Navigation Co. Ltd.*, 137 Law Times Rep. 266 (1927), construing a provision of the Australian Sea-Carriage of Goods

vant: "Even if it is true, as appellant contends, that the district court's finding of inherent vice was based upon improper inferences from general conditions at Laredo, the evidence is nevertheless ample to support the judge's additional finding that the *defendant* was *not negligent* and hence did not contribute to the spoilage." (312 F. 2d, at 105) (Emphasis supplied). In short, once the case is one of spoilage or decay, the question is not whether the spoilage was expectable in some unusual way, but simply whether the carrier's negligence contributed to it.

Act," similar to the provision contained in the Bill involved here. There, the House of Lords affirmed a judgment in favor of the carrier in a suit for damages for the spoilage of a cargo of apples shipped from Australia to London. It had been found that "there had been no want of care" by the carrier. The House of Lords rejected the contention that to avail itself of the "inherent vice" exception, the carrier must "put a name to the vice or specify some particular inherent quality and distinguish it from all others." 137 Law Times Rep., at 270. The Court also dismissed the argument that "inherent vice is a term indicative of some abnormal defect or disease, and that the normal fact that apples are but mortal is not sufficient . . ." *Id.*, at 271. As the Court put it, it was enough that the apples "decayed not because of the ship or of the route, but because they were apples . . . This is the kind of risk which the Act does not call on the [carrier] to bear, for he has really nothing to do with it . . ." *Ibid.* Accordingly, the Court concluded that the case was within the "inherent vice" clause.

In fact, it has been common ground, even conceded in the published positions of the representatives of the interests of agricultural shippers, that damage in the nature of spoilage or decay of perishable goods falls within the "inherent vice" exception, and that accordingly as to such spoilage the carrier may obtain exoneration by showing its freedom from fault. See the position of the Secretary of Agriculture, "as representative of the Agricultural Community in the United

¹⁴ "[N]either the ship nor her owner . . . shall be responsible for damage to . . . the goods resulting from . . . the inherent defect, quality, or vice of the goods." § 8(2), Australian Sea-Carriage of Goods Act, Statute No. 14 of 1904.

States", noted in *Secretary of Agriculture v. United States*, *supra*, at 165, n. 9. (Brief, pp. 12-13, for the Secretary in that case.)

It has never before been intimated that the exception embraces only spoilage or decay of some extraordinary or unusual nature. The Bill certainly does not support such a construction. It was, therefore, inconsistent with established principles and erroneous for the courts below to proceed on the basis that the exception for damages "resulting from a defect or vice in the property" did not altogether embrace the decay or spoilage of perishable goods not contributed to by any fault on the part of the carrier.¹⁵

C. The Carrier Is Not Liable for Damage in the Form of Spoilage Under the Provisions of the Perishable Protective Tariff Applicable to the Shipment Here

The conclusion that the carrier is not liable in the circumstances presented by the record here is con-

¹⁵ Accordingly, inasmuch as it was undisputed that the damage to the goods was in the form of spoilage and decay, the court below should not have submitted to the jury as a separate issue the question whether the worsened condition of the melons upon arrival "was due solely to an inherent vice." (R. 178.) But in any event, the jury's "no" answer is immaterial. Under Texas law and practice, the failure of a jury to find the affirmative of the special issue submitted to it does not constitute an affirmative finding to the contrary. See the authorities collected in note 6, *supra*. Accordingly, the "no" answer of the jury did not constitute a finding that the damage to the melons did not result solely from inherent vice. The undisputed facts that a perishable commodity was involved and that the loss took the form of spoilage and decay, and the affirmative finding that the carrier had complied with the shipper's instructions, and was free from negligence, are sufficient to bring the case as a matter of law within the "inherent vice" exception, when that exception is properly construed, and not limited in the fashion in which it was viewed by the courts below. The courts below did not indicate that there was any conflict between the findings under the Texas law; and, as indicated, there is none.

firmed by the provisions of a special tariff applicable to the shipment of perishables.

Rule 130 of Perishable Protective Tariff No. 17 (Appendix, p. 25, *infra*), which applied to the shipment ~~is~~ the present case,¹⁸ provides in relevant part that "carriers furnishing protective service as provided herein do not undertake to overcome the inherent tendency of perishable goods to deteriorate or decay, but merely to retard such deterioration or decay insofar as may be accomplished by reasonable protective service . . . performed without negligence." It has been repeatedly held that this tariff prescribes the standard of liability in suits for spoilage and decay. See, *e.g.*, *Trautmann Bros. Co. v. Missouri Pac. R.R.*, *supra*, at 104; *Atlantic Coast Line R.R. v. Georgia Packing Co.*, 164 F. 2d 1, 4 (5th Cir. 1947); *Delphi Frosted Foods Corp. v. Illinois Cent. R.R.*, *supra*, 188 F. 2d, at 346; *Hamilton Foods, Inc. v. Atchison, T. & S.F. R.R.*, *supra*, 83 F. Supp., at 479; *Sutton v. Minneapolis & St. L. Ry.*, 222 Minn. 233, 236, 23 N.W. 2d 561, 562 (1946).

The Court of Appeals for the Ninth Circuit expressed the standard of liability under this tariff in *Larry's Sandwiches, Inc. v. Pacific Elec. Ry.*, *supra*, at 692-93, as follows:

¹⁸ The Bill of Lading (R. 157) recites that the goods were "Received, subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading." The Perishable Protective Tariff was filed with the ICC pursuant to 49 U.S.C. § 6(1), and it is controlling. *Pennsylvania R.R. v. Greene*, 173 F. Supp. 657, 659 (S.D. Ala. 1959). See *Davis v. Cornwell*, 264 U.S. 560, 562 (1924).

"Where perishable goods are involved the provisions of the Carmack amendment codifying the common law are given force through the Perishable Protective Tariff . . . Rules 130 and 135 of that tariff establish the tests of negligence.

"Upon proof of the perishable nature of the goods the carrier is relieved of its insurer's liability, and its duty becomes one 'to furnish without negligence reasonable protective service of the kind and extent so directed or elected by the shipper . . .'
(Rule 135.)

"Thus, in the case of perishable goods the burden upon the carrier is not to prove that the damage resulted from the inherent vice of the goods, but to prove its own compliance with the rules of the tariff and the shipper's instructions . . ."

The history of the Interstate Commerce Commission's approval of this tariff is illuminating. It was originally proposed that carriers furnishing protective services be absolved of "any liability" for deterioration or decay. See *Perishable Freight Investigation*, 56 I.C.C. 449, 481 (1920). It was objected that under this formulation the carriers would not be answerable for damage even if negligent, and the rule was accordingly revised by the Commission itself to its present form under which "The duty of the carrier is to furnish without negligence reasonable protective service" (Rule 135, Appendix, p. 25, *infra*). The Court below in effect has revised the protective tariff so as to render the carrier liable for deterioration or decay even if it exercises reasonable care and adheres to the shipper's instructions.

The protective tariff would be unintelligible except against the background of a common law rule which exonerates the carrier from liability for damage in the form of spoilage and decay where it can prove its freedom from negligence and its compliance with the shipper's instructions. Otherwise, the state of the law would be that the carrier would be liable only for negligence in the case of spoilage of perishables if protective services were requested, but absolutely liable if they were not. We submit that this would be an absurd conclusion.

Moreover, the tariff recites that the carrier "furnishing protective service as provided herein does not undertake to overcome the inherent tendency of perishable goods to deteriorate or decay..." Again, this provision would be unintelligible if the carrier, at common law, already had a duty to overcome this tendency. Thus, whether the tariff be viewed as prescribing the ultimate standard for decision in this case—a case undisputably of spoilage and decay, where protective services were requested and furnished,—or whether it is viewed simply as evidence of the common law rule, the conclusion is the same: The carrier is exonerated if it performs its obligations without negligence and in accord with the shipper's instructions.

Therefore, in the present case, the jury finding that the carrier had borne the burden of proof that it had performed its obligations without fault and in accord with the instructions of the shipper, absolved the carrier in the light of the protective tariff and required the entry of judgment for petitioner.

CONCLUSION

For the reasons stated, the judgment of the Texas Supreme Court should be reversed.

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January 1964

APPENDIX**Rules 130 and 135 of Perishable Protective Tariff No. 17**

"Rule 130—CONDITION OF PERISHABLE GOODS NOT GUARANTEED BY CARRIERS.—Carriers furnishing protective service as provided herein do not undertake to overcome the inherent tendency of perishable goods to deteriorate or decay, but merely to retard such deterioration or decay insofar as may be accomplished by reasonable protective service, of the kind and extent requested by the shipper, performed without negligence."

"Rule 135—LIABILITY OF CARRIERS.—Property accepted for shipment under the terms and conditions of this tariff will be received and transported subject to such directions, only, and to such election by the shipper respecting the character and incidents of the protective service as are provided for herein. The duty of the carrier is to furnish without negligence reasonable protective service of the kind and extent so directed or elected by the shipper and carriers are not liable for any loss or damage that may occur because of the acts of the shipper or because the directions of the shipper were incomplete, inadequate or ill-conceived."

TABLE OF CONTENTS

	Page
I. INTEREST OF AMICUS CURIAE	1
II. INTRODUCTORY STATEMENT	3
III. SUMMARY OF ARGUMENT	5
IV. ARGUMENT	6
Point 1. Under federal common law a railroad is not liable for the deterioration or decay of perishable commodities where the railroad's services have been performed without negligence	6
Point 2. Where perishable goods are received in apparent good order and delivered by the railroad in a deteriorated or decayed condition the liability of the railroad must be determined in accordance with the terms and conditions of the shipping contract and under such contract the railroad is not liable when its services have been performed without negligence	11
Point 3. Under the terms of the shipping contract the fact that the injury or damage to the perishable goods was in the nature of deterioration or decay made a <i>prima facie</i> case for the exception provided in the shipping contract and the burden was on the shipper to establish negligence on the part of the railroad	22
Point 4. In instances of deterioration or decay of perishables, where the railroad's service has been performed without negligence and in complete accordance with the shipper's instructions, the loss resulting from such deterioration or decay properly should be borne by the shipper or owner of the perishable goods	27
CONCLUSION	34
CERTIFICATE OF SERVICE	35
APPENDIX	36

TABLE OF CASES

	<i>Page</i>
Atlantic Coast Line Railroad Co. v. Georgia Packing Co., 164 F.2d 1 (5th Cir. 1947)	10, 13, 14
Bills of Lading, 52 ICC 671 (1919)	14, 18
F. O. Bradley & Sons, Ltd. v. Federal Steam Navigation Co., Ltd., 137 Law Times Rep. 266 (H.L. 1927)	32, 33
Cau v. Texas & Pacific Ry. Co., 194 U.S. 247, 48 L.Ed. 1053, 24 S.Ct. 663 (1904)	12
Domestic Bill of Lading and Live Stock Contract, 64 ICC 357 (1921)	15
Export Bill of Lading, 64 ICC 347 (1921) ..	14, 15, 17, 18
The Folmina, 212 U.S. 354, 53 L.Ed. 546, 29 S.Ct. 363 (1909)	23, 24
The Henry B. Hyde, 90 Fed. Rep. 114 (9th Cir. 1898) ..	24, 25
Illinois Steel Co. v. Baltimore & Ohio Railroad Co., 320 U.S. 508, 88 L.Ed. 259, 64 S.Ct. 322 (1944)	19
Larry's Sandwiches, Inc. v. Pacific Electric Railway Co., 318 F.2d 690 (9th Cir. 1963)	9, 10, 11, 22, 26
The Lennox, 90 Fed. Rep. 308 (1898)	25
Mannheim Ins. Co. v. Erie & Transp. Co., 72 Minn. 357, 75 N.W. Rep. 602 (1898)	19
The Monte Iciar, 167 F. 2d 334 (3rd Cir. 1948)	23
New York Central Railroad Co. v. Berry Sons' Co., 338 Pa. 500, 12 Atl. 2d 588 (1940)	15
Perishable Freight Investigation, 56 ICC 449 (1920)	15, 20, 28, 29
Providence Fruit & Produce Exchange v. New York Central & Hudson River Railroad Co., 33 ICC 294 (1915)	29, 30
Schnell v. The Vallescura, 293 U.S. 296, 79 L.Ed. 373, 55 S.Ct. 194 (1934)	31

	<i>Page</i>
Schroader v. Railway Express Agency, 237 N.C. 456, 75 S.E. 2d 393 (1953)	15
Southern Express Co. v. Caldwell, 88 U.S. 264, 22 L.Ed. 556, 21 Wall. 264 (1874)	12
Southern Pacific Co. v. Itule, 51 Ariz. 25; 74 Pac. 2d 38; 115 ALR 1268 (1937)	7, 8, 9
Southern Railway v. Prescott, 240 U.S. 632, 60 L.Ed. 836, 36 S.Ct. 469 (1916)	14
Southwestern Sugar and Molasses Co. v. River Termi- nals Corp., 360 U.S. 411, 3 L.Ed. 2nd 1334, 79 S.Ct. 1210 (1959)	15
Trautmann Bros. Co. v. Missouri Pacific Railroad Co., 312 F.2d 102 (5th Cir. 1962)	10, 13, 22, 26
York Co. v. Central Railroad, 3 Wall. 107 (1865)	12

TABLE OF FEDERAL STATUTES

Interstate Commerce Act, § 1(6), 49 U.S.C. § 1(6)	14
---	----

RULES OF THIS COURT

Rule 42(2)	1
------------------	---

MISCELLANEOUS

Angell On Law of Carriers, §210	7
Hutchinson On Carriers, 3rd Edition, §390, 401, 418 ..	13
Schouler's Bailments and Carriers, 3rd Edition, §416 ..	7

IN THE
Supreme Court of the United States

OCTOBER TERM, 1963

No. 292

MISSOURI PACIFIC RAILROAD COMPANY, *Petitioner*,

v.

ELMORE & STAHL, *Respondent*

**BRIEF OF ASSOCIATION OF AMERICAN RAIL-
ROADS AS AMICUS CURIAE IN SUPPORT OF
PETITIONER, MISSOURI PACIFIC RAILROAD
COMPANY**

The Association of American Railroads hereby files its Brief as *amicus curiae* in this case, pursuant to Rule 42(2) of the Rules of the Supreme Court. The Brief is accompanied by written consent to its filing from the Missouri Pacific Railroad Company and Elmore & Stahl. These are all of the parties in the case.

I. INTEREST OF AMICUS CURIAE

The Association of American Railroads (hereinafter referred to as the A.A.R.) is a voluntary, unincorporated, nonprofit organization composed of member railroad companies operating in the United States, Canada, and Mexico. The member railroads operate more than 95 percent of the total railroad mileage and have operating revenues of approximately 98 percent of the total railroad operating revenues of all railroads

in the United States. The activities of the A.A.R. cover a wide range, having to do with such matters as research, operation, car service, safety, public relations, accounting, statistics, law, and federal legislation and regulation, insofar as those matters require or lend themselves to joint handling in the interest of safe, adequate and efficient railroad service to the public.

For many years the railroads have coordinated certain matters relating to freight loss and damage claims through a central agency, which is now the Freight Claim Division of the A.A.R., with headquarters in Chicago. The agency began in 1892 as the Freight Claim Association. The responsibilities of the Freight Claim Division, A.A.R., include promotion of prompt and lawful adjustment of freight loss and damage claims, and the equitable apportionment among carriers of amounts paid in such settlements. The Division publishes a code of *Principles and Practices for the Investigation and Disposition of Freight Claims* and a code of *Freight Claim Rules*, and progresses numerous activities in the interest of improving freight claim procedures and the reporting of freight claim statistics and minimizing claim adjustment problems of a general nature.

The A.A.R. is the joint representative and agent of these railroads in connection with federal legislation and with legal matters of common concern to the industry as a whole. It has an interest in significant interpretations of federal law that will apply generally to all of its members. The issues raised in the present case relating to the proper construction of the federal law governing carrier liability for deterioration or spoilage of perishables in transit are important to the entire railroad industry.

During the year 1962, for example, 33 of the principal fresh fruit, melon, and vegetable carrying railroads in the United States reported having paid a total of \$8,328,470 in freight loss and damage claims with respect to carload shipments of those commodities.¹ This amount, in the main, represents claim payments where some fault of the railroad was indicated. It is thus clear that the carriers already are subject to a burdensome difficulty in terms of loss and damage in the handling of perishables. If the holding of the Supreme Court of Texas is affirmed as the federal law, the problem for the railroad industry will be greatly magnified and the burden intolerable.

II. INTRODUCTORY STATEMENT

Briefly, the facts of the instant case embrace the shipment of one refrigerator car (ART 35042) of honeydew melons from Rio Grande City, Texas, to Chicago, Illinois. The melons were received by the railroad in apparent good order at Rio Grande City. The shipper elected and directed that the protective service to be accorded by the railroad would be that of "standard refrigeration." Upon arrival at destination the melons were discovered to have undergone spoilage or decay.

In the trial court, the jury made several special findings, among which were those summarized as follows:

1. That when tendered to the carrier by the shipper, the melons were in such condition that they would have been reasonably expected to arrive at destination in good merchantable condition;

¹ Association of American Railroads, Freight Claim Division, Circular No. FCD 1897 (June 24, 1963).

2. That at the time of arrival at Chicago, the melons were in a worse condition than would reasonably have been anticipated; and
3. That the transportation services were performed by the carrier without negligence, and as instructed by the shipper and in a reasonably prudent manner.

On the basis of the special findings by the jury, the Supreme Court of Texas upheld the Texas Court of Civil Appeals' ruling, which in turn upheld the trial court's ruling that the railroad was liable for the spoilage of the melons.

The issue before this Court, stated simply, is this: When a shipper of a perishable commodity establishes and relies upon a *prima facie* case of deterioration or decay of a perishable commodity, does proof and a jury finding that the railroad was free from negligence constitute a complete defense to the *prima facie* case relied upon by the shipper?

It is the position of the A.A.R. that, at common law and under the provisions of the shipping contract, proof and a jury finding that the railroad performed its services without negligence and in accordance with the instructions of the shipper constitutes a complete defense to the *prima facie* case relied upon by the shipper. This is fully and convincingly argued in the brief of petitioner, Missouri Pacific Railroad Company, and we agree with and adopt the argument there set forth.

There are several points that we should like to emphasize and there are additional aspects we should like to present, all of which have substantial bearing on the issue before this Court.

III. SUMMARY OF ARGUMENT

1. The loss for which recovery is sought in this case was indisputably loss in the nature of deterioration and decay of the perishable commodity. The plaintiff relied upon a *prima facie* case. There was a jury finding that the railroad's services were performed without negligence, in complete accordance with the shipper's instructions, and in all respects in a prudent manner.

Under these facts, the Supreme Court of Texas erred in construing the common law so as to hold the railroad liable unless it affirmatively established that the deterioration and decay was due *solely* to some excepted cause. At common law a railroad is not liable for deterioration and decay of a perishable commodity when its services have been performed without negligence and in complete accordance with the shipper's instructions.

2. The railroad's liability is fixed by the terms and conditions of the shipping contract. Under the shipping contract the railroad's liability for deterioration or decay of the perishable commodity was a liability for negligence only. If the shipping contract coincides with the common law in this respect, the non-liability of the railroad rests, nevertheless, upon the shipping contract. If the common law be as the Supreme Court of Texas construed it, then there is a conflict between that common law and the terms and conditions of the shipping contract. In such event, the shipping contract must prevail, and the railroad is not liable for the deterioration or decay when its services have been performed without negligence and in complete accordance with the shipper's instructions.

3. The shipping contract contains an express exception of liability for loss in the nature of deterioration and decay, in the absence of negligence on the part of the railroad. Since the loss was in the nature of deterioration and decay, a *prima facie* case was made for the exception and the burden was on the shipper to prove negligence by the carrier.

4. Expert knowledge of the characteristics, peculiarities, defects, or vices of his perishable commodity rests solely in the shipper. The railroad neither has nor should it be chargeable with such knowledge. Accordingly, in instances of deterioration or decay of a perishable commodity, sound public policy requires or justifies a restriction of railroad liability to that for its own negligence, whether such restriction be found in the common law or made in the shipping contract.

IV ARGUMENT

POINT 1

Under Federal Common Law a Railroad is not Liable for the Deterioration or Decay of Perishable Commodities where the Railroad's Services have been Performed without Negligence.

The Supreme Court of Texas erroneously construed and applied the federal common law. In effect, the Texas Supreme Court's decision makes the railroad an insurer with respect to the condition of perishable commodities and liable for their deterioration or decay unless the railroad meets the burden of establishing by affirmative evidence that the deterioration or decay was the result of an act of God, the public enemy, the fault of the shipper, or the inherent nature of the goods themselves. The Court said:

Where the common law rule is strictly enforced, the carrier is not an insurer with respect to damage caused solely by one of the excepted perils, but its responsibility is similar to that of an insurer in so far as other risks are concerned. (Trans. p. 241)

The Court was of the view that "where the loss is not due to one of these specified causes, it is immaterial whether the carrier has exercised due care or was negligent." (Trans. p. 238) Consequently, the Court held that in the instance of deterioration or decay of inanimate perishables the railroad may not exonerate itself by showing that all transportation services were performed without negligence but must go further and establish that the loss and damage was caused by one of the four excepted perils recognized at common law. (Trans. p. 237)

Contrary to the holding of the Texas Supreme Court, the common law relieves a railroad of liability for the deterioration or decay of perishables where the services of the railroad have been performed without negligence. *Schouler's Bailments and Carriers*, Third Edition, § 416; *Angell On Law of Carriers*, § 210. In the leading case of *Southern Pacific Company v. Itule*, 51 Ariz. 25; 74 Pac. 2d 38; 115 ALR 1268 (1937), the court dealt with the matter of liability and burden of proof with respect to a shipment of tomatoes that arrived at destination in a deteriorated or decayed condition. The court stated the question before it as follows:

The matter which was in dispute was whether these goods partook of the nature of ordinary inanimate bodies, and the burden of showing the specific cause of the damage was on the

carrier, or whether they were rather of the character of livestock, and it was sufficient for the carrier to show it had not been guilty of any actual negligence in transportation, without the necessity of proving the specific reason for the injury. *The great majority of modern cases take the latter view.* *Howe v. Great Northern R. Co.* 176 Minn. 46, 222 N.W. 290; *Cassone v. New York, etc. R. Co.*, 100 Conn. 262, 123 A. 280; *Philadelphia, B. & W. R. Co. v. Diffendal*, 109 Md. 494, 72 A. 193, 458; *Fean v. Alabama Great Southern R. Co.* 26 Ohio App. 96, 159 N.E. 487; *W. E. Roche Fruit Co. v. Northern Pac. R. Co.*, 184 Wash. 695, 52 P.2d 325. There are a few, however, which apparently hold to the contrary. *Chesapeake & O.R. Co. v. Timberlake*, 147 Va. 304, 137 S.E. 507. (p. 41) (Emphasis supplied)

Referring to the perishable nature of the commodity, the court commented:

•It is a notorious fact, of which the courts may well take judicial notice, that all fruits and vegetables of every nature will ultimately decay, although no human agency has approached them after their maturity. (p. 41)

The court then stated the common law rule to be:

We think the fairer and more logical rule is that in cases of the shipment of perishable fruits and vegetables, *when the carrier shows affirmatively that it handled them in the method requested by the shipper, and that it exercised reasonable care to prevent any damage from any cause not necessarily involved in the method of transportation so chosen, that it has satisfied the requirements of the law in regard to the quantum of proof required to es-*

tablish a defense to the action. (pp. 41, 42)
(Emphasis supplied)

The Supreme Court of Texas referred to the *Itule* case, *supra*, as "perhaps the leading authority" in support of the rule that the common law rule of liability as an insurer does not apply in the case of perishable goods and that liability for loss or injury in the nature of deterioration or decay depends in all cases upon negligence. Immediately after this reference, and in apparent answer to the *Itule* case, the Supreme Court of Texas said:

The parties here agree, however, that the liability of a carrier for damage to an interstate shipment is a matter of Federal law to be determined by the Federal statutes and decisions. (Trans. p. 239)

There is no distinction, however, between the rule of common law recognized by the *Itule* case, *supra*, and the federal law. In *Larry's Sandwiches, Inc. v. Pacific Electric Ry. Co.*, 318 F.2d 690 (9th Cir. 1963) the Court said that the Carmack amendment had been construed as codifying the common law rule of a carrier's liability and that

Where perishable goods are involved the provisions of the Carmack amendment codifying the common law are given force through the Perishable Protective Tariff No. 18 of the General Rules and Regulations of the Interstate Commerce Commission. *Rules 130 and 135 of that tariff establish the tests of negligence.* (p. 692) (Emphasis supplied)

The Court then stated the rule as follows: .

Thus, in the case of perishable goods *the burden upon the carrier is not to prove that the damage resulted from the inherent vice of the goods, but to prove its own compliance with the rules of the tariff and the shipper's instructions.* See e.g., *U.S. v. Reading Company*, supra; *Illinois Packing Co. v. Atchison, Topeka & Santa Fe Ry. Co.* (7 Cir. 1956) 236 F.2d 908, 909-910; *Delphic Frosted Foods Corp. v. Illinois Central R. Co.* (6 Cir. 1961) 188 F.2d 343, 346-347. (pp. 692-693) (Emphasis supplied)

It is clear the court in the *Larry's Sandwiches* case considered that under the federal common law a carrier's liability for the deterioration or decay of perishable goods is predicated upon negligence of the carrier. Since Rules 130 and 135 of the shipping contract established negligence as the test of liability and since the Carmack amendment made the carrier liable for damage caused by it, the court was of the view that the Carmack amendment and Rules 130 and 135 expressed the federal common law.

In *Trautmann Bros. Co. v. Missouri Pacific Railroad Co.* 312 F.2d 102, (1962) the Court of Appeals, Fifth Circuit, was of the view that, in instances of deterioration or decay of inanimate perishable commodities, proof of absence of negligence on the part of the carrier constituted a defense. See also *Atlantic Coast Line R. Co. v. Georgia Packing Co.* 164 F.2d 1 (5th Cir. 1947).

Referring to the contention of Petitioner in the court below, the Supreme Court of Texas said:

It [Petitioner] seems to be saying that when the claim is for spoilage or decay, the carrier

should have the benefit of a presumption that the damage was due solely to natural deterioration. We do not agree. (Trans. p. 243)

We agree with Petitioner that in instances of spoilage and decay of perishables, where it is found that the carrier performed all transportation services without negligence, the case is one falling within the "inherent vice" exception. However, we do not think that the matter need necessarily be expressed in terms of the availability of an "exception". We think it is just as true to say that where the damage is in the nature of spoilage or decay, the common law imposes no liability upon the carrier, in the absence of negligence on the part of the carrier. *Larry's Sandwiches case, supra, Trautmann case, supra, Itule case, supra.*

The common law rule clearly is that where the damage is in the nature of spoilage or decay and the carrier has established that its services were performed without negligence, it has met the only burden of proof imposed by the common law and need not go further and establish the particular cause of the spoilage or decay.

POINT 2

Where Perishable Goods are Received in Apparent Good Order and Delivered by the Railroad in a Deteriorated or Decayed Condition the Liability of the Railroad must be Determined in Accordance with the Terms and Conditions of the Shipping Contract and Under Such Contract the Railroad is not Liable when its Services Have Been Performed without Negligence.

The Texas Supreme Court construed the shipping contract as imposing upon the railroad full common

carrier liability as at common law. We previously have pointed out that at common law a railroad is not liable for damage in the nature of spoilage and decay of perishable commodities when it is shown that the services of the railroad were performed without negligence and in complete accordance with the shipper's instructions.

The Texas Supreme Court, however, construed the common law as imposing on the railroad an insurer's liability for the spoilage or decay unless the railroad established by affirmative proof that the spoilage or decay was due entirely to the inherent nature of the goods. That Court refused to construe the provisions of the shipping contract as limiting the railroad's liability for damage in the nature of spoilage or decay to liability solely for its own negligence. In so doing the Supreme Court of Texas must have been influenced largely by its view that

Neither the Congress nor the Federal courts have declared that the liability of a common carrier for damage to inanimate perishables may be predicated only upon negligence. (Trans. p. 243)

It is a well recognized and accepted principle that a carrier may limit its liability by valid contract with the shipper. The only restrictions on such limitations are that they shall not relieve the carrier of its own negligence or wrongful act and that the limitations so provided shall not be contrary to public policy. *Cau v. Texas & Pacific Ry. Co.*, 194 U.S. 427, 48 L.Ed. 1053, 24 S.Ct. 663, (1904); *York Co. v. Central Railroad*, 3 Wall. 407 (1865); *Southern Express Co. v. Caldwell*, 88 U.S. 264, 22 L.Ed. 556, 21 Wall. 264, (1874);

Hutchinson on Carriers (3rd Ed.) §§ 390, 401, 418.

That a railroad may limit its liability for spoilage or decay of perishables to that for its own negligence is made clear in *Atlantic Coast Line R. Co. v. Georgia Packing Co.*, *supra*. The Court there said:

With respect to the degree of care required of a carrier in the transporting or refrigeration of perishable goods, the shipment of goods by rail interstate is subject to the provisions of the Interstate Commerce Act, 49 U.S.C.A. Under § 20 of that act, the responsibility assumed by the carrier is fixed by the agreement made and contained in the bill of lading, in accordance with published tariffs and regulations. *Chesapeake & Ohio Ry. v. Martin*, 283 U.S. 209, 51 S.Ct. 453, 75 L.Ed. 983; *Lancaster v. McCarty*, 267 U.S. 427, 45 S.Ct. 342, 69 L.Ed. 696; *Boston & Maine R. Co. v. Hooker*, 233 U.S. 97, 34 S.Ct. 526, 58 L.Ed. 868, L.R.A. 1915B, 450, Ann. Cas. 1915D, 593; *Standard Hotel Supply Co. v. Pennsylvania R. Co.*, D.C., 65 F. Supp. 439. (p. 3)

The Court then referred to Rules 130 and 135 of the Perishable Protective Tariff and held:

It is apparent that these rules limit the liability of a carrier transporting perishable goods to liability for negligent failure reasonably to carry out instructions given by the shipper. (p. 3)

In the later case of *Trautmann Bros. Co. v. Missouri Pacific Railroad Co.*, *supra*, after referring to Rules 130 and 135 as limiting the liability of a carrier transporting perishable goods to that for its own negligence, the same Court pointed out that:

Nothing in Section 20(11) of the Transportation Act, 49 U.S.C. § 20(11), precludes a carrier's limiting its liability in that manner, notwithstanding appellant's contention to the contrary. The section provides simply that a carrier cannot limit its liability for damages *caused by the carrier.* (p. 104)

The shipping contract in the case under review contained provisions limiting the liability of the railroad for damage in the nature of spoilage or decay to that of liability for negligence only.

The shipping contract consists of the bill of lading and the provisions, rules and regulations of applicable tariffs lawfully published and filed with the Interstate Commerce Commission. No departure is permitted from the terms and conditions of the shipping contract, including those with respect to liability of the railroad. *Southern Railway v. Prescott*, 240 U.S. 632, 60 L.Ed. 836, 36 S.Ct. 469, (1916); *Atlantic Coast Line R. Co. v. Georgia Packing Co.*, *supra*.

The bill of lading provides that the goods are "received, subject to the classifications and tariffs in effect" and that every service to be performed thereunder "shall be subject to all conditions not prohibited by law . . . including the conditions on the back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns." The form and terms of the bill of lading are a part of the Uniform Freight Classification No. 4, one of the applicable railroad tariffs lawfully published and filed pursuant to § 1(6) of the Interstate Commerce Act, 49 U.S.C. § 1(6). The form and terms of the bill of lading were found reasonable and were prescribed by the Interstate Commerce Commission in *Bills of Lading*, 52 ICC.671 (1919); *Ex-*

port Bill of Lading, 64 ICC 347 (1921); *Domestic Bill of Lading and Live Stock Contract*, 64 ICC 357 (1921).

The bill of lading in the instant case was that known as the Uniform Straight Bill of Lading (Trans. pp. 157-163). Sections 1(a) and (b) of the bill of lading deal with carrier liability.¹

Rules 130 and 135 of Perishable Protective Tariff No. 17² are the rules of that particular tariff dealing with liability of a railroad when transporting a perishable commodity and were approved by the Interstate Commerce Commission. *Perishable Freight Investigation*, 56 ICC 449 (1920).

Rule 1 of Uniform Freight Classification No. 4³ also contains provisions dealing with liability of the railroad.

Validity of the provisions of the shipping contract is not in issue.

The classification is a tariff lawfully on file with the Interstate Commerce Commission and having the force and effect of federal statute. *Southwestern Sugar and Molasses Co. v. River Terminals Corp.*, 360 U.S. 411, 3 L.Ed. 2d 1334, 79 S.Ct. 1210, (1959). This Court accordingly is requested, subject to its discretion, to take judicial notice of Rule 1 thereof. *New York Central R. Co. v. Berry Sons' Co.*, 338 Pa. 500, 12 Atl. 2d 588 (1940); *Schroader v. Railway Express Agency*, 237 N.C. 456, 75 S.E.2d 393 (1953).

¹ Provisions of §§ 1(a) and (b) are set out at page 36 of Appendix hereto.

² Provisions of Rules 130 and 135 are set out at page 37 of Appendix hereto.

³ Provisions of Rule 1 of Uniform Freight Classifications No. 4 are set out at pages 37-39 of Appendix hereto.

The Supreme Court of Texas failed to analyze properly the fundamental meaning and effect of the provisions of the shipping contract as they relate to carrier liability and the burden of proof with respect thereto. That Court's treatment of the provisions of the shipping contract gives Rules 130 and 135 no meaningful effect whatsoever. Indeed, it concluded that the terms of the shipping contract did no more than state the common law, which law would have been applicable had there been no expressed shipping contract at all. It concluded that the instant case was one to be governed entirely by the common law and that the railroad could only relieve itself of liability for the deteriorated or decayed condition of the melons in question by affirmative proof that the deterioration or decay was caused by the inherent nature of the commodity.¹

Rule 1(b) of the Uniform Freight Classification gave the shipper the option of shipping his perishable goods subject either to the terms and conditions of the shipping contract that he entered into or under liability imposed by common law, as he "may elect to have a limited liability or a common carrier's liability service." (App. p. 37). Rule 1(c) provides that if he elects not to accept all the terms and conditions of the shipping contract he should so notify the agent of the carrier at the time his property is offered for shipment. Rule 1(d) provides that if such notice is given the property "will be carried at carrier's liability, limited only as provided by common law, and by the laws of the United States and of the several States insofar as they

¹ As pointed out in Brief of Petitioner, the Texas Supreme Court seemingly went so far as to hold that the deterioration or decay must be shown to have resulted from a peculiar or distinctive vice existing in the particular melons.

apply, but subject to the terms and conditions" of the bill of lading "insofar as they are not inconsistent with such common carrier liability." (App. p. 38). In that event it was provided that the rate charged by the carrier would be 10 percent higher. (App. p. 38)

In the instant case the shipper elected to have his goods transported under "limited liability" and subject to the terms and conditions of the usual shipping contract.

To interpret the shipping contract entered into, as did the Texas Supreme Court, as imposing upon the railroad full common carrier liability at common law, as it construed the common law, would make utterly meaningless the provisions of the foregoing rule and utterly meaningless the terms and conditions of the shipping contract. Obviously a distinction between common carrier liability at common law and the carrier's liability under the usual shipping contract was provided.

Where the shipper, exercising his election, does not contract for full common law liability of common carriage but accepts the provisions of the usual shipping contract, there is a valid agreement that the carrier's liability, if so provided, shall be less than the full liability under common law. As stated by the Interstate Commerce Commission in *Export Bill of Lading, supra*, the usual shipping contract provides for the carrier substantially less than the full common law liability of the common carrier.

The greater the risk, the greater is the value to the shipper of the service rendered, which should be rewarded accordingly. *A lesser compensation is appropriate in cases where the*

carrier is to a large extent relieved from the full liability of common carriers. (p. 354)
(Emphasis supplied)

In the instant case the shipper elected to have his perishable melons transported at the lesser compensation appropriate where the carrier was relieved from the full common law liability of common carriers.

In *Bills of Lading, supra*, the Interstate Commerce explained:

So, the law is now well settled, both in this country and in England, that a carrier may, unless forbidden by statute, limit or restrict, or even extend and enlarge, its common-law liability. Such contracts must, however, be invested with all the requirements of validity attaching to other forms of contract. Mutual assent and a valuable consideration must exist to support the assumption by the carrier of more than its common-law risks or, on the other hand, to support a restriction or limitation of those risks. A consideration for the latter is usually found in the agreement by the carrier to apply a lower or, as it is expressed in the governing freight classifications in effect in this country, "reduced" rate; and this is a sufficient consideration. (pp. 680-681)

Rule 1 of Uniform Freight Classification No. 4 is of the type referred to in the above statement of the Interstate Commerce Commission, and the "reduced" rate referred to is the same as the "reduced" rate referred to in Uniform Freight Classification No. 4, Rule 1(c). (App. p. 38)

As far back as 1898, by provisions in a prior freight classification, lawfully published and filed with the In-

terstate Commerce Commission, the railroads offered shippers a choice of common carrier common-law liability or limited liability. *Mannheim Ins. Co. v. Erie & Transp. Co.*, 72 Minn. 357, 75 N.W. Reporter 602 (1898). There the Court pointed to the election offered the shipper in the freight classification there applicable and stated:

It is a matter of common knowledge that the great bulk of the freight of the country is now transported under bills of lading limiting the common-law liability of the carrier. It is the exception, and not the rule, for property to be carried under the full common-law liability.
(p. 604)

A construction of Rules 130 and 135 of Perishable Protective Tariff No. 17 in accordance with their meaning and, as must be done, with a view to giving them effective application (*Illinois Steel Co. v. Baltimore & Ohio R. Co.*, 320 U.S. 508, 88 L.Ed. 259, 64 S.Ct. 322, (1944) makes it clear the rules provide that the railroad is not liable for the deteriorated or decayed condition of perishables where its service is performed without negligence and in accordance with shipper instructions.

Rule 130 of Perishable Protective Tariff No. 17, and as such a provision of the shipping contract, is set forth under the heading: "Condition of Perishable Goods Not Guaranteed by Carriers." This is an express disavowal by the carrier of liability as an insurer when transporting a perishable commodity. The rule further provides that the undertaking of the carrier simply is to retard deterioration or decay "insofar as may be accomplished by reasonable protective service, of the kind and extent requested by the shipper, performed

without negligence." (App. p. 37). The tariff rule is a clear statement that the railroad will not be liable for loss or damage in the nature of deterioration or decay unless caused by negligence on its part. Referring to the rules in the perishable protective tariff dealing with carrier liability and duty, the Interstate Commerce Commission, in *Perishable Freight Investigation*, *supra*, said:

These declarations are predicated upon the special hazard resulting from the perishable nature of the freight, or from the exercise by the shipper of some measure of control over the form or degree of protective service accorded. (p. 481)

As respects any particular shipment of a perishable commodity, the protective service selected and directed by the shipper and performed by the railroad may or may not succeed in retarding the processes of deterioration or decay. In either event, and with respect to that particular shipment, retardation of deterioration or decay will, in the language of Rule 130, have been achieved "insofar as may be accomplished by reasonable protective service, of the kind and extent requested by the shipper." In the absence of a showing of carrier negligence, if the protective service rendered has not succeeded in retarding the processes of deterioration or decay, then, by the terms of the rule in the shipping contract, the railroad is not liable for loss or damage in the nature of deterioration or decay.

Rule 135, inserted in the tariff at the direction of the Interstate Commerce Commission, provides that "the duty of the carrier is to furnish without negligence reasonable protective service of the kind and extent

so directed or elected by the shipper. . . ." Here, again, the rule required by the Commission is a clear statement that the sole duty resting upon the railroad is to perform the service without negligence.

These provisions in the shipping contract for non-liability are not concerned with the cause of the deterioration or decay of the perishable goods in the absence of negligence or fault on the part of the railroad. Clearly they make liability of the railroad wholly dependent upon its own negligence:

The railroad's liability is fixed by the shipping contract. The condition of the contract is that the railroad shall not be liable in the instance of deterioration or decay of a perishable commodity where its services have been performed without negligence. If this is the common law, as we hereinbefore have pointed out, the non-liability of the carrier rests, nevertheless, upon the express provisions of the shipping contract. If it be not the common law, as was the view of the Supreme Court of Texas, the railroad's limited liability is fixed, nevertheless, by the terms of the shipping contract.

We do not mean to suggest that, in the case of the precise claim at bar, the common law imposes a greater liability than that imposed by the terms of the shipping contract. As we have argued, it is clear from the modern cases that the common law does not recognize liability on the part of the carrier for the spoilage and decay of perishables where the carrier performs the transportation services without negligence and in accordance with the instructions of the shipper. However, we do contend that the effect of Rule 1(b) of the Uniform Freight Classification is to confirm the controlling applicability of Rules 130 and 135 of the Perishable Protective

Tariff, which form a part of the shipping contract, and which very clearly establish that the carrier is not liable for the spoilage and decay of perishables, absent negligence or failure to follow the shipper's instruction.

In the instant case not only did the shipper fail to prove any negligence or fault on the part of the railroad, but there was evidence and a jury finding that the railroad was not guilty of any negligence or fault. Such constituted a complete defense to the so-called *prima facie* case relied upon by the shipper. *Larry's Sandwiches case, supra; Trautmann case, supra.*

POINT 3

Under the Terms of the Shipping Contract the Fact that the Injury or Damage to the Perishable Goods was in the Nature of Deterioration or Decay made a Prima Facie Case for the Exception Provided in the Shipping Contract and the Burden was on the Shipper to Establish Negligence on the Part of the Railroad.

We have pointed out previously that Rules 130 and 135 of Perishable Protective Tariff No. 17 are a clear statement that the railroad is not liable for loss or damage in the nature of deterioration or decay unless shown to be caused by negligence on its part. In the instant case the evidence established beyond question that the injury to the melons was in the nature of deterioration or decay. Since the injury was of the nature of deterioration or decay, that fact made a *prima facie* case that the injury came within the exception to liability under the shipping contract.

Insofar as liability for deterioration or decay is concerned, the shipping contract with the railroad is analogous to and identical in effect with contracts of

affreightment entered into by steamship companies and which provide an exception to liability for loss or damage of a particular nature, such as decay, when not shown to have been caused by the carrier's negligence. That such cases may be those involving water carriers adds or subtracts nothing from the expressed meaning of the provisions of the contract as interpreted by the courts or the holdings with respect to the burden of proof of negligence or of excepted liability.

In a case involving the transportation of rice under a contract of affreightment providing that the ship "is not to be liable for sweat, rust, decay, vermin, rain or spray", this Court recognized that such provision did not relieve the carrier of liability for injury of that nature when caused by its own fault or negligence, but stated the rule in *The Folmina*, 212 U.S. 354, 53 L.Ed. 546, 29 S.Ct. 363, (1909), as follows:

Of course, where goods are delivered in a damaged condition, plainly caused by breakage, rust or decay, their condition brings them within an exception exempting from that character of loss, as *the very fact of the nature of the injury shows the damage to be prima facie within the exception*, and hence the burden is upon the shipper to establish that the goods are removed from its operation because of the negligence of the carrier. (p. 362) (Emphasis supplied)

In *The Monte Iciar*, 167 F.2d 334 (1948), the Circuit Court of Appeals, Third Circuit, had under consideration a case involving a shipment of wooden barrels containing dry sherry. The shipping contract provided that the carrier would not be responsible for leakage, breakage or spigoting. The loss was in the nature of

leakage. The Court ruled that such a loss was *prima facie* within the exception to the shipping contract, quoting from *The Folmina, supra*, and held that where the injury was of such *nature* as to come within the exception in the shipping contract the burden is upon the shipper to show that the loss occurred as a result of negligence on the part of the carrier.

In *The Henry B. Hyde*, 90 Fed. Rep. 114 (1898) the shipping contract contained a provision that the ship was "not accountable for leakage, rust, or breakage." It was admitted that the goods were received in good order and condition and were damaged while on the voyage, the injury being in the nature of breakage. No evidence was introduced by either party to show from what cause the breakage occurred. The Circuit Court of Appeals, Ninth Circuit, held:

It is conceded that the carrier may limit its liability by such a contract with the shipper, but that, notwithstanding such limitation of liability, the ship shall still be answerable for the negligence of its officers and employees. There is only one question, therefore, before the court, and that is, upon which party rests the burden of proof to show whether or not there was negligence? The rule seems to be well settled by the authorities that, in determining whether or not an injury to goods is of such a character as to come within an exception of liability which is provided for in the bill of lading, the burden of proof is cast upon the carrier; but that *after it is once determined that the injury is of a nature, or has occurred from a cause, for which liability is excepted, it devolves upon him who claims damages to show that the loss occurred through the carrier's negligence.* The Delhi, 4 Ben.

345, Fed. Cas. No. 3,770; *Vaughan v. 630 Casks of Sherry Wine*, 7 Ben. 507, Fed. Cas. No. 16,900; *Wolff v. The Vaderland*, 18 Fed. 733; *The New Orleans*, 26 Fed. 44; *The Timor*, 14 C.C.A. 412, 67 Fed. 365; *Clark v. Barnwell*, 12 How. 272; *Transportation Co. v. Downer*, 11 Wall. 129. *In the present case no question arose concerning the nature of the damage that had been sustained. The loss was wholly from breakage. It is so alleged in the libel. The ship was not accountable for breakage. There was nothing, therefore, for the carrier to prove in order to place the loss within the clause which excepted liability. . . .*

In the present case the stipulation was explicit. The nature of the injury indicated for itself that it belonged within the specified exemption from liability. The burden of proof therefore rested upon the libelants to establish by the evidence that the breakage occurred through the negligence of the ship's employes. No evidence having been offered to the court to prove such negligence, we find no error in the decree dismissing the libel. (pp. 115-116) (Emphasis supplied)

See also *The Lennox*, 90 Fed. Rep. 308 (1898)

The rule fixed by the foregoing authorities is clear.

The exceptions to liability provided in a shipping contract may be of two kinds, namely, (a) exceptions of injury resulting from certain specified causes, and (b) exceptions of injury of a certain nature itself.

In instances coming within (a), above, the carrier must show the injury to have resulted from the excepted cause, while in instances falling under (b), above, the

carrier need submit no proof of cause and the shipper must show the excepted injury to have been caused by the carrier's negligence.

The shipping contract in the instant case, with respect to a perishable commodity, contains an exception from liability of injury or damage of a certain *nature*, namely, deterioration or decay. The evidence established that the injury unquestionably was in the nature of deterioration or decay and a *prima facie* case was thus made for the exception in the shipping contract. It was not incumbent upon the railroad to show that the injury of the excepted nature resulted from any particular cause, but simply that the injury was of that nature. The shipping contract clearly provided that the railroad would not be liable for injury in the *nature* of deterioration or decay, where the railroad's service is "performed without negligence."

Under the posture of the case below and applying the rule of law clearly applicable, since the injury was of an excepted nature, a *prima facie* case was made for the exception, and the burden was on the shipper to establish negligence on the part of the carrier.

Even if the shipping contract should be construed as placing upon the railroad the burden of establishing that it was free from negligence in order to bring the injury within the *nature* excepted by the contract, that burden was met fully by evidence and a jury finding that the railroad was not guilty of fault or negligence. *Larry's Sandwiches, Inc. v. Pacific Electric Railway Co., supra; Trautmann Bros. Co v. Missouri Pacific Railroad Co., supra.*

POINT 4

In Instances of Deterioration or Decay of Perishables, Where the Railroad's Service Has Been Performed Without Negligence and in Complete Accordance with the Shipper's Instructions, the Loss Properly Should Be Borne by the Shipper or Owner of the Perishable Goods.

One engaged in the production and marketing of perishable commodities is of necessity engaged in the production and marketing of a commodity which has an inherent weakness or vice. By the commodity's very nature it inevitably will undergo a process of deterioration and decay. Besides the inherent and characteristic weakness or vice of being subject to the processes of deterioration and decay, practically every perishable commodity is capable of having within itself special defects or vices, not apparent from visual inspection of the commodity in its natural state, that may cause more rapid deterioration or decay and notwithstanding its handling according to the best known and accepted customs and practices of the trade.

The shipper or owner of the perishable commodity is peculiarly knowledgeable with respect to these matters. The extent of maturity and ripeness of his produce; its peculiar characteristics and weaknesses; the circumstances, including weather and climatic conditions, under which it was grown and harvested; the circumstances and duration of its storage prior to shipment; the nature and extent of preparation, treatment, handling and packing necessary to place it in a marketable condition, are all matters with respect to which the shipper is peculiarly and solely knowledgeable. For example, tomatoes harvested immediately after heavy rainfall are especially vulnerable to deterioration and

decay and regardless of the protective service rendered. Apples that have been in cold storage for a certain period of time and are shipped in a given season will have inherent weaknesses that will not be found in apples that have been in cold storage for a different period of time, whether shipped in the same or a different season. The apple, peach or pear, which from all outside and visible appearances may seem in good order, may have concealed and inherent weaknesses leading to deterioration or decay and against which no protective services could guard during shipment.

Referring to such matters as those recited above, the Interstate Commerce Commission, in *Perishable Freight Investigation*, *supra*, explained:

The degree and amount of refrigeration required vary widely. Some kinds of perishable freight need more ice than others or a different method of icing. Thus, citrus fruits differ in this respect from deciduous fruits. Berries deteriorate more rapidly than peaches, and apples are less perishable than either. Vegetables have equally varied characteristics. Fresh meat requires the maximum degree of refrigeration. Fruit or vegetables precooled before shipment require less ice in transit than when loaded direct from field or orchard. Packing-house and dairy products are generally precooled and when reduced to a very low temperature, as they sometimes are, in a measure take the place of ice. Seasonal conditions produce somewhat similar variations. To some extent refrigeration practices are dictated by commercial exigencies. For example, fruit shipped to a cannery for preserving purposes requires less protection than fruit shipped to the market for sale. Frequently suf-

ficient protection against heat may be obtained by the use of an un-iced but insulated and ventilated car; and this is also true of protection against cold. As will later appear, these briefly enumerated peculiarities and incidents of refrigeration have a bearing in determining fair and reasonable charges. (p. 454)

Not only do these peculiarities and characteristics have a bearing in determining a fair and reasonable service but, we submit, being matters within the peculiar knowledge of the shipper, they have substantial bearing upon the question of who should bear loss in the matter of deterioration or decay where the railroad's services have been performed without negligence and in complete accordance with the shipper's instructions.

Equally appropriate is the comment of the Interstate Commerce Commission in *Providence Fruit & Produce Exchange v. New York Central & Hudson River Railroad Company*, 33 ICC 294 (1915):

The need for ice varies with the condition of the shipment when loaded and the method of loading. Ripe fruit needs more refrigeration than green; cold-storage fruit more than fresh; fruit grown in a wet season more than fruit grown in a dry season; fruit loaded five tiers high more than fruit loaded three or four tiers; and fruit without spaces between the crates more than fruit loaded with spaces between crates.

Carrier's employees at the icing stations ordinarily are familiar with none of these matters, especially with respect to particular shipments. It was testified that even if they opened the car and examined its contents they would be none the wiser because of their lack

of expert knowledge; that an inspection of the freight would indicate the amount of ice needed only to an expert fruit man; and that even if carrier's employees possessed such knowledge, the opening of the car door might do considerable injury to the freight, and further, would break the seal record, thus hampering the investigation of claims for loss. (p. 295) (Emphasis supplied)

The Commission commented further upon the responsibility resting on the railroad and pointed out that the railroad could not be expected to substitute its discretion or judgment for the more expert knowledge of the shipper as to the requirements of particular shipments.

The responsibility rests upon the defendant to comply with shippers' instructions under ordinary conditions and to exercise all reasonable precaution to protect the shippers' interests under emergencies which arise from time to time. There is no evidence that the defendant has failed to meet these obligations. *It can not be expected to substitute the discretion or judgment of its employees for the more expert knowledge of the shipper as to the requirements of particular shipments.* (p. 296) (Emphasis supplied)

Railroad tariffs provide a wide range of protective services from which the shipper may elect and direct that to be accorded his shipment. That the protective service so elected is or should be adequate to arrest or retard deterioration or decay of his particular goods is a matter lying peculiarly within the knowledge of the shipper. The carrier simply agrees to render the serv-

ice so elected by the shipper and without negligence on the part of the carrier.

The Supreme Court of Texas, in its opinion below, sets out the following quotation from the case of *Schnell v. The Vallescura*, 293 U.S. 296, 79 L.Ed. 373, 55 S.Ct. 194 (1934):

The reason for the rule is apparent. He is a bailee entrusted with the shipper's goods, with respect to the care and safe delivery of which the law imposes upon him an extraordinary duty. Discharge of the duty is peculiarly within his control. All the facts and circumstances upon which he may rely to relieve him of that duty are peculiarly within his knowledge and usually unknown to the shipper. In consequence, the law casts upon him the burden of the loss which he cannot explain or, explaining, bring within the exceptional case in which he is relieved from liability. (Trans. p. 240)

We find two difficulties with the Texas Court's quotation from and reliance upon this case. First, the evidence in that case established that the carrier was guilty of negligence and therefore had not discharged the duty imposed upon it. Second, we believe the duty referred to in the above quotation simply is to transport the perishable commodity in a careful and safe manner, that is, free from any negligence or fault in the performance of the carrier's service. In no other way can we reconcile statements that discharge of the duty is peculiarly within the carrier's control and that all the facts and circumstances upon which he may rely to relieve him of that duty are peculiarly within his knowledge and usually unknown to the shipper. With

respect to such matters as we previously have pointed out, which are simply by way of illustration, we believe most of the facts and circumstances that would lead to the deterioration or decay of his perishable commodity lie peculiarly within the knowledge of the shipper. Such is the basis for the fundamental division of responsibility laid down in the leading English case where it was said "the carrier answers for his ship and men, the cargo-owner for his cargo". *F. O. Bradley & Sons Ltd. v. Federal Steam Navigation Company Ltd.*, 137 Law Times Rep. 266 (H.L. 1927).

This division of responsibility has been the basis for the custom in the railroad industry to decline payment of claims for deterioration or decay of perishables where the railroad services have been performed without negligence and in complete accordance with the shipper's instructions. Such a case is customarily referred to, in the language of the trade, as a "clear record case". This practice is of many years standing and has been generally accepted by all parties concerned.

The decision of the Supreme Court of Texas would constitute a vital change in this respect. In all probability there would be a substantially greater movement of perishables that are not in proper condition to withstand the normal hazards of transportation, even under the best of refrigerated service. Whether perishables would be in such condition at point of origin is a matter lying peculiarly within the knowledge of the shipper, and one with respect to which railroad personnel cannot reasonably be expected to be knowledgeable. They neither could nor should substitute their judgment for the informed and expert knowledge of the shipper.

. If the shipper knows that the railroad will be liable

even under a clear record of handling without negligence and in full compliance with the shipper's instructions, there is certain to be an increased tendency on the part of shippers to ship perishables so long as they ostensibly are in suitable condition and without regard to their actual ability to withstand the normal hazards of transportation. Under such circumstances a shipper would be assuming no risk whatsoever. He would be in that enviable position to which all gamblers aspire, namely, "heads I win, tails you lose."

The principle which relieves a carrier of liability for spoilage or decay where its services are performed without negligence and in accordance with the instructions of the shipper is rested upon sound ground. It places the responsibility and burden of the loss on the party who is in the business of producing and marketing the perishable commodity, and who knows most about it. As stated in the *F. O. Bradley & Sons case, supra*:

The carrier has at least some means of controlling his crew and has full opportunity of making his ship seaworthy; but of the cargo he knows little or nothing, and as the shipper has the advantage over him in this respect, he must bear the risks belonging to the cargo.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the Supreme Court of Texas is in error and should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing brief has this day been served on each party to this case by mailing copies thereof to the respective counsel of record at their post office addresses, first-class mail, postage prepaid.

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January 13, 1964

APPENDIX

UNIFORM STRAIGHT BILL OF LADING—§§1(a) and (b)

(a) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided.

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for natural shrinkage. The carrier's liability shall be that of warehouseman, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of delivery of the property to the party entitled to receive it, has been made. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton, or from riots or strikes.

**RULES 130 AND 135—PERISHABLE PROTECTIVE
TARIFF NO. 17**

Rule 130—Condition of Perishable Goods Not Guaranteed by Carriers. — Carriers furnishing protective service as provided herein do not undertake to overcome the inherent tendency of perishable goods to deteriorate or decay, but merely to retard such deterioration or decay insofar as may be accomplished by reasonable protective service, of the kind and extent requested by the shipper, performed without negligence.

Rule 135—Liability of Carriers.—Property accepted for shipment under the terms and conditions of this tariff will be received and transported subject to such directions, only, and to such election by the shipper respecting the character and incidents of the protective service as are provided for herein. The duty of the carrier is to furnish without negligence reasonable protective service of the kind and extent so directed or elected by the shipper and carriers are not liable for any loss or damage that may occur because of the acts of the shipper or because the directions of the shipper were incomplete, inadequate or ill-conceived.

UNIFORM FREIGHT CLASSIFICATION NO. 4**Paragraphs (b), (c), (d) and (e) of Rule 1**

(b) In order that consignor may have option of shipping property, either subject to the terms and conditions of Uniform Domestic Bill of Lading or Uniform Export Bill of Lading, as the case may be, hereinafter set forth, or under the liability imposed upon common carriers by common law and Federal and State statutes applicable thereto, this classification provides for different rates and for different forms of Bills of Lading to be used, respectively, as consignor may elect to have a limited liability or a common carrier's liability service.

(c) Unless otherwise provided in this Classification, property will be carried at the reduced rate specified if shipped subject to all the terms and conditions of Uniform Domestic Bill of Lading (see pages 182 to 194, inclusive, of Classification), or Uniform Export Bill of Lading (see pages 195 to 200, inclusive, of Classification), as the case may be. If consignor elects not to accept all the terms and conditions of Uniform Domestic Bill of Lading or Uniform Export Bill of Lading, as the case may be, he should so notify agent of forwarding carrier at time his property is offered for shipment. If he does not give such notice, it will be understood that he desires his property carried subject to the terms and conditions of Uniform Domestic Bill of Lading or Uniform Export Bill of Lading, as the case may be, in order to secure the reduced rate.

The carriers are not required to transport property by any particular train or vessel or in time for any particular market or otherwise than with reasonable dispatch. (See Section 2(a) of bill of lading conditions.) Notations on bills of lading requiring delivery within or at a specified time will be without force or effect.

(d) Property carried not subject to all the terms and conditions of Uniform Domestic Bill of Lading or Uniform Export Bill of Lading, as the case may be, will be carried at carrier's liability, limited only as provided by common law and by the laws of the United States and of the several States in so far as they apply, but subject to the terms and conditions of Uniform Domestic Bill of Lading or Uniform Export Bill of Lading, as the case may be, in so far as they are not inconsistent with such common carrier's liability, and the rate charged therefor will be 10% higher (subject to a minimum increase of one cent per 100 lbs.) than the rate

charged for property shipped subject to all the terms and conditions of Uniform Domestic Bill of Lading or Uniform Export Bill of Lading, as the case may be.

(e) When consignor gives notice to agent of forwarding carrier that he elects not to accept all the terms and conditions of Uniform Domestic Bill of Lading or Uniform Export Bill of Lading, as the case may be, but desires a common carrier's liability service at the higher rate charged for that service, carrier must print, write or stamp upon Uniform Domestic Bill of Lading or Uniform Export Bill of Lading, as the case may be, a clause signed by the agent reading: "In consideration of the higher rate charged, the property herein described will be carried at the carrier's liability, limited only as provided by law; but subject to the terms and conditions of Uniform Domestic Bill of Lading or Uniform Export Bill of Lading, as the case may be, in so far as they are not inconsistent with such common carrier's liability."

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IN THE
Supreme Court of the United States
October Term, 1963

No. 292

MISSOURI PACIFIC RAILROAD COMPANY, *Petitioner*

v.

ELMORE & STAHL, *Respondent*

**On Writ of Certiorari to the Supreme Court
of Texas**

BRIEF FOR THE RESPONDENT

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INDEX

Question Presented	Page
Statement	1
Summary of Argument	2
Argument	4
A. The Interstate Commerce Act, 49 U.S.C. Sec. 20(11), Codifying and strengthening the common law, imposes upon the carrier liability for the "Full Actual" Damage to the property shipped unless the carrier proves one of the specific causes relieving it of responsibility.	8
B. Under the terms and conditions of the bill of lading contract the carrier assumes liability for all damage unless it is able to prove that the damage falls within one of the exceptions specified therein.	20
C. The Interstate Commerce Act prohibits a carrier from limiting its liability by tariff.	24
D. If a carrier fails to prove that the damage was due to an excepted cause it is only proper that it be charged with the loss.	27
Conclusion	34

CITATIONS

CASES	Page
Adams Express Co. v. Croninger, 226 U.S. 491 (1913)	10
Atlantic Coast Line R. Co. v. Georgia Packing Co., 164 F.2d 1 (5th Cir. 1947)	12, 16
Austin v. Seaboard Air Line R. Co., 188 F.2d 239 (5th Cir. 1951)	11

II

CASES

	Page
Bank of Kentucky v. Adams Exp. Co., 93 U.S. 174, 181, 23 L.ed. 872, 875	18
Barrett v. Van Pelt, 268 U.S. 85, 89-90	11
Boston & M. R. Co. v. Piper, 246 U.S. 439, 445 (1918)	24
C & O Ry. Co. v. Thompson Mfg. Co., 270 U.S. 416, 422	11
California Packing Corp. v. The Empire State, 180 F. Supp. 19 (N.D. Cal. 1960)	10
Central Vermont Ry. v. White, 238 U.S. 507 (1915)	24
Chicago & E. T. R. Co. v. Collins Produce Co., 249 U.S. 186, 191-193 (1919)	10
Chicago & N.W. R. Co. v. Whitnack Produce Co., 258 U.S. 369 (1922)	10
Chesapeake & O. R. Co. v. Thompson Mfg. Co., 270 U.S. 416 (1926)	14, 15, 16
Cincinnati N.O. & T.P.R. Co. v. Rankin, 241 U.S. 319 (1916)	10
Commercial Molasses Corp. v. New York Tank Barge Corp., 314 U.S. 104, 108-109 (1941)	10
Commodity Credit Corp. v. Norton, 167 F.2d 161, (3rd Cir. 1948)	10
Compania DeVapores Insco, S. A. v. Missouri Pacific R. Co., 232 F.2d 657 (5th Cir. 1956)	10
Delphi Frosted Foods Corp. v. Illinois Cent. R.R., 89 F. Supp. 55 (W.D. Ky. 1950), 188 F.2d 343 (6th Cir. 1951), 342 U.S. 833 (1951)	12, 13, 14, 16
F. O. Bradley & Sons Ltd. v. Federal Steam Navi- gation Co., Ltd., 137 Law Times Rep., 266 (H. L. 1927)	13
Hall v. Nashville & C. R. Co., 13 Wall, 367, 372, 20 L.ed. 594, 596	17
Hamilton Foods v. Atchison, Topeka & Santa Fe Ry. Co., 83 F. Supp. 478 (S.D. Cal. 1948), 173 F.2d 575 (9th Cir. 1949)	12

III

CASES	Page
Illinois Packing Co. v. Atchison, Topeka & Santa Fe Ry. Co., 236 F.2d 908 (7th Cir. 1956)	14, 15
Larry's Sandwiches, Inc. v. Pacific Elec. Ry., 318 F.2d 690 (9th Cir. 1963)	14, 16, 20, 22, 24, 25
Lehigh Valley R. Co. v. State of Russia, 21 F.2d 396 (2nd Cir. 1927)	10
Louisiana Southern Ry. Co. v. Anderson, Clayton & Co., 191 F.2d 784 (5th Cir. 1951)	10
Memphis & C. R. Co. v. Reeves, 10 Wall., 176, 189, 19 L. ed. 909, 912	17
New York C. R. Co. v. Lockwood, 17 Wall., 357, 376, 21 L. ed. 627, 639, 10 Am. Neg. Cas. 624	18
Ohio Galvanizing & Mfg. Co. v. Southern Pac. Co., 39 F.2d 840, 841 (1930), 282 U.S. 879	4
Reider v. Thompson, 116 F. Supp., 279 (E. D. La. 1953)	10
Schnell v. The Vallescura, 293 U.S. 296, 304 (1934)	4, 7
Secretary of Agriculture v. United States, 350 U.S. 162, 165	6, 8, 9, 10, 14, 20
Southern Pac. Co. v. Itule, 51 Ariz. 25, 74 P. 2d 38 (1937)	9, 12, 16, 22, 23
Southern-Plaza Express v. Harville, 233 F.2d 264 (5th Cir. 1956)	13
Southwestern Sugar and Molasses Co. v. River Terminals Corp., 360 U.S. 411 (1959)	25
Texas & P. Ry. Co. v. Empacadora de Ciudad Juarez, S.A., 309 S.W.2d 926, Ct. Civ.App. Tex. (1957)	33
The Malcolm Baxter, Jr., 277 U.S. 323 (1928)	24
Thompson v. James McCarrick Co., Inc., 205 F.2d 897 (5th Cir. 1953)	13
Trautman Bros. Co. v. Missouri Pac. R.R., 312 F.2d 102 (5th Cir. 1962)	13, 33

IV

CASES

	Page
U. S. v. Reading Co., 184 F. Supp. 206 (E. D. Penn.)	15
U. S. v. Reading Co., 289 F.2d 7 (3rd Cir. 1961)	14
United States of America v. Fruit Growers' Express Co., 279 U.S. 363 (1929)	30
United States v. Mississippi Valley Barge Line Co., 285 F.2d 381 (8th Cir. 1960)	10
Yeckes-Eichenbaum, Inc. v. Texas Mexican Ry. Co., 263 F.2d 791 (5th Cir. 1959), 361 U.S. 827	13, 32, 33

MISCELLANEOUS

41 B Texas Jurisprudence (1953)	3
4 R.C.L., Sec. 176	7
53 A.L.R. 990, 996-1019	9
115 A.L.R. 1274 - 1280	9
51 Cong. Rec. 9625, 9778-9; 9625, 9780	11
13 C.J.S. Sec. 71, p. 131-136	20
Bills of Lading, 52 I.C.C. 671 (1919)	23
Perishable Freight Investigation, 56 I.C.C. 449 (1920)	25, 26
49 U.S.C. Sec. 20 (11)	6, 8, 10, 11, 13, 24
Perishable Protective Tariff No. 17	7, 9, 14, 24
49 U.S.C. Sec. 20 (12)	30
Uniform Freight Classification No. 4	24

IN THE
Supreme Court of the United States

October Term, 1963

No. 292

MISSOURI PACIFIC RAILROAD COMPANY, *Petitioner*

v.

ELMORE & STAHL, *Respondent*

On Writ of Certiorari to the Supreme Court
of Texas

BRIEF FOR THE RESPONDENT

QUESTION PRESENTED

After a shipper of inanimate perishables by common carrier in interstate commerce has made out a prima facie case of carrier liability, can the carrier exonerate itself without pleading and proving that the damage was due to one or more of the excepted perils recognized at common law and that it did not contribute to such damage by any breach of its contract of carriage?

STATEMENT

In June of 1958, respondent delivered to petitioner at Rio Grande City, Texas, a carload of honeydew melons for which petitioner issued its uniform straight bill of lading which acknowledged receipt of the property in apparent good order. (Pl. Ex. 1, R. 11, 157.)¹ Upon arrival at destination in Chicago, Illinois, the melons were inspected by the United States Department of Agriculture and found to be damaged. The damage consisted of 15% light to dark brown discoloration and 3% decay (Pl. Ex. 5, R. 11, 173).² The receiver of the car sold the melons for respondent on a commission basis (Pl. Ex. 4, R. 11, 171) (R. 39).

Respondent filed suit alleging the melons were in good condition at origin and in a damaged condition upon arrival at destination (R. 6-7). In answer to special issues the jury found that respondent had proven such allegations (R. 176).³

Correctly recognizing the proof required to successfully defend such an action, petitioner, in answer, alleged:

A. "That the damage, * * * was the result of the nature of said commodities and the inherent vice thereof, * * *."

¹ Petitioner's expert witness pointed out that in a shipment of honeydew melons, every melon in the crate is visible and, therefore, any damage can be easily seen without opening the crate (R. 136-137).

² Petitioner's statement that the damage averaged approximately 15% was incorrect (Pet. Br. 4, fn. 4).

³ Petitioner makes no contention that the evidence fails to support the findings of the jury.

- B. "That the damage, * * * was the direct result of acts or omissions of plaintiff * * *."
- C. That petitioner furnished all services requested by respondent and complied with the terms of the bill of lading and in accordance with the Perishable Protective Tariff. (R. 5)

and the jury found:

- A. That the damage was not due solely to an inherent vice (R. 178).⁴
- B. That the damage was not the result of acts or omissions of respondent (R. 178).

⁴ Petitioner's argument that the jury's answer to this issue is immaterial and did not constitute a finding that the damage did not result solely from inherent vice is incorrect. (Pet. Br. 5, fn. 4-20 fn. 15). The Supreme Court of Texas interpreted the finding by stating that the jury refused to find that the condition of the melons in Chicago was due solely to inherent vice (R. 238). The authorities cited by petitioner do not hold otherwise (Pet. Br. 5, fn. 6). In 41 B Texas Jurisprudence (1953) on page 780 the author is discussing the importance of not misleading the jury and states:

"Thus where the jury are asked 'Do you find from a preponderance of the evidence that this condition did not exist etc., Answer 'yes' or 'no', the issue as so framed is calculated to confuse; the answer 'no' does not indicate that the jury affirmatively find that the condition existed, but merely that the party having the burden of proof did not establish the nonexistence of the condition."

Respondent has no quarrel with the rule as stated by petitioner but it does not apply to the inherent vice issue. For an example of a proper application, refer to Issue No. 5 (R. 177). The jury was asked if the worsened condition was not in any part caused by the failure of the carrier and instructed to answer "It was due to the failure of the carrier" or "no". (R. 177). By their answer the jury simply said that there was not enough evidence for them to find that the damage was not due to the failure of the carrier. Such negative finding would not support or justify an affirmative finding that the carrier was in fact negligent.

- C. That petitioner handled the car in a reasonably prudent manner and in accordance with petitioner's instructions and the bill of lading contract (R. 177).⁵

In its opinion, the Supreme Court of Texas pointed out that "no attack has been made on the jury findings in this case, and petitioner does not say that the damage to the melons was caused by one of the excepted perils mentioned above" (R. 239).

SUMMARY OF ARGUMENT

Respondent contends that when a shipper of perishables in interstate commerce has shown that the condition of the commodity was in worse condition upon arrival at destination than when delivered to carrier at origin,⁶ he is entitled to judgment,⁷ unless the carrier alleges and proves that the damaged condition was caused by one of the expected perils recognized at common law and that it was not guilty of any breach of contract which contributed to the damage.⁸ Petitioner contends, however,

⁵ There is a conflict between Issues No. 3 and No. 4 and Issue No. 5, but since, under respondent's theory of the case, the answers are immaterial, no question on this point has ever been urged by respondent (R. 177).

⁶ It is incorrect to say that a shipper must prove good condition at origin and poor condition at destination. Shipper need only show that the merchandise was, when delivered to such carrier, in better condition than it was after receipt at destination. *Ohio Galvanizing & Mfg. Co. v. Southern Pac. Co.*, 39 F.2d 840, 841 (1930 cert. den. 282 U.S. 879).

⁷ Shipper has the burden of alleging and proving the amount of his damages.

⁸ Carrier's compliance with the contract would include reasonable performance of all matters not covered by the terms and conditions of the bill of lading or shipper's instructions.

that in a perishable case it may exonerate itself merely by establishing freedom from negligence and that it need not establish that the damage falls within one of the excepted perils. This position is contrary to the overwhelming weight of authority in the United States.

The argument of petitioner, made for the first time in this court, that mere proof of the perishability of a commodity and its damage establishes the exception of inherent vice, is not at all well taken (Pet. Br. 2).⁹ The fallacy of petitioner's argument is twofold. In the first place, decay is descriptive of a resultant condition for which neither the common law nor the contract of carriage provides an exception from liability. It cannot be equated with a cause of a condition, such as inherent vice, for which an exception is provided.¹⁰ Secondly, while petitioner uses the word "spoilage" throughout its brief, such word is never defined. Respondent submits that the term "spoilage" must necessarily include every conceivable type of damage that could occur to a perishable commodity. If a honeydew melon is cracked, bruised, decayed, discolored, overripe, frozen or otherwise damaged, such melon has become spoiled. The contention of the petitioner, there-

⁹ The trial court defined inherent vice to the jury as follows:

"The term 'inherent vice,' as used in this Charge, means any existing defects, diseases, decay or the inherent nature of the commodity which will cause it to deteriorate with a lapse of time." (R. 175).

¹⁰ In *Schnell v. The Vallescura*, 293 U.S. 296 (1934), on pages 305-306 the Court said:

"But the decay of a perishable cargo is not a cause; it is an effect. It may be the result of a number of causes, for some of which, such as the inherent defects of the cargo * * * the carrier is not liable. For others, such as * * * failure to care for the cargo properly during the voyage, he is liable."

fore, if valid, would eliminate any affirmative burden on the part of the carrier to establish that any damage, in any case, resulted from inherent vice.

1. The liability of a carrier for damage to an interstate shipment is a matter of Federal law controlled by Federal statutes and decisions. Section 20(11) of the Interstate Commerce Act makes carriers liable "for the full actual loss, damage or injury * * * caused by" them to property they transport, and declares unlawful and void, any contract, regulation, tariff, or other attempted means of limiting this liability. The act makes no distinction between shipments of inanimate perishable commodities and shipments of inanimate nonperishable commodities. In a recent case, petitioner joined in an amicus brief wherein it was conceded that Section 20(11) codifies the common-law rule making a carrier liable, without proof of negligence, for all damage to the goods transported by it, unless it affirmatively shows that the damage was occasioned by the shipper, act of God, the public enemy, "public authority or the inherent vice or nature of the commodity. *Secretary of Agriculture v. United States*, 350 U.S. 162, 165.

2. The bill of lading contract provides that the carrier or party in possession of any of the property therein described shall be liable as at common law for any loss thereof or damage thereto, unless the damage is caused by the act of God, act or default of the shipper, natural shrinkage or except in case of negligence, for damage resulting from a defect or vice in the property (R. 158). Petitioner's argument cannot be reconciled with the terms of the bill of lading. Such terms and conditions must be either overruled or ignored. The contract provides that

carrier shall be liable as at common law with certain exceptions, whereas petitioner claims that carrier is not liable for any damage unless it is negligent.

3. Rules 130 and 135 of the Perishable Protective Tariff, No. 17, set out in the lower court's opinion, merely elaborate on the exception for damage resulting from a default or vice in the property, (Rule 130) and the exception for damage caused by the act or default of the shipper (Rule 135) (R. 240-241). They do not, by their terms or intent, modify the applicable common law rule. If, however, these rules are construed to limit the common law liability of the carrier, they are unlawful and void under the clear wording of the Interstate Commerce Act.

4. Some of the reasons why the law, in pursuance of a wise policy, places the burden upon the carrier to prove the damage was occasioned by a cause for which it is not liable are discussed in a number of the earlier cases including *Schnell v. The Vallescura*, 293 U.S. 296, 304 (1934). Despite petitioner's argument to the contrary, it is the only rule which will operate with any degree of fairness whatsoever to the shipper. It is inconceivable that the Congress of the United States, in enacting the Carmack Amendment, and the courts in interpreting same, intended that a shipper be at the complete mercy of the carrier.

As applicable today as it was when written, is the statement of the reason for the rule in 4 R. C. L. Sec. 176, as follows:

"The carrier's exclusive possession of evidence, the difficulties under which the bailor might labor in discovering and proving the carrier's fault, his inability to contradict the carrier's witnesses, the necessity of

avoiding the investigation of circumstances impossible to be unraveled, the importance of stimulating the care and fidelity of the carrier, and the convenience of a simple, intelligible, and uniform rule in so extensive a business, in other words, commercial necessity plus public policy and convenience, constitute much broader grounds and are the basis for the acceptance of the rule at the present time.

"In its application there is less of hardship than has sometimes been supposed; for while the law holds the carrier to an extraordinary degree of diligence, and treats him as an insurer of the property, it allows him, like other insurers, to demand a premium proportioned to the hazards of his employment. At all events, such severity as may inhere in the rule seems necessary to the security of property, and the protection of commerce; it is founded on a great principle of public policy; has been approved by many generations of wise men; and if the courts were now at liberty to make instead of declaring the law, it may well be questioned whether they could devise a system which on the whole would operate more beneficially."

ARGUMENT

A. THE INTERSTATE COMMERCE ACT, 49 U.S.C. Sec. 20(11), CODIFYING AND STRENGTHENING THE COMMON LAW, IMPOSES UPON THE CARRIER LIABILITY FOR THE "FULL ACTUAL" DAMAGE TO THE PROPERTY SHIPPED UNLESS THE CARRIER PROVES ONE OF THE SPECIFIC CAUSES RELIEVING IT OF RESPONSIBILITY.

In a recent case before the Supreme Court the parties conceded the above was a correct statement of the law applicable to perishable shipments. *Secretary of Agri-*

culture v. The United States, 350 U.S. 162, 165, fn. 9, (1956). Petitioner apparently admits that, except in the case of loss arising from injury to livestock in transit, no distinction was made at common law on the basis of its nature or character as perishable or nonperishable (Pet. Br. 12). It is petitioner's theory that a carrier is exempt from liability for damages to a perishable shipment upon showing freedom from negligence because of the evolution in recent years of a new rule (Pet. Br. 12).¹¹

Petitioner has cited a number of cases decided by various state courts which in general follow the rule announced in *Southern Pac. Co. v. Itule*, 51 Ariz. 25, 74 P. 2d 38 (1937) (Pet. Br. 13). There are probably as many or more state court decisions which hold that a carrier in order to exonerate itself must prove the damage was occasioned by an excepted cause. 53 A.L.R. 990, 996-1019; 115 A.L.R. 1274-1280.

Probably the leading case on the point under consideration is *Schnell v. The Vallescura*, 293 U.S. 296 (1934). It is not enough to distinguish the decision by stating that the carrier was found to have been negligent. So far as respondent has been able to determine, this Court has never made any distinction of carrier liability on the basis of the commodity being perishable or nonperishable, but on the contrary, the insurer rule has been applied, in

¹¹ I.C.C. 34, Perishable Protective Tariff 17, Item 25880, (Feb. 1957) defines perishable freight as "any commodity which is susceptible to deterioration or decay, and/or which may be protected by refrigeration, icing, ventilation or against cold, **including**." (Emphasis added). The tariff then lists approximately 150 various items. It is interesting to note that under the tariff such commodities as chestnuts; eggs; canned fruits; molasses; paper, building or wrapping, waxed, and/or asphalted, as well as tallow are perishable commodities.

addition to onions, to apples, molasses and most recently, eggs. *Chicago & N.W. R. Co. v. Whitnack Produce Co.*, 258 U.S. 369 (1922); *Commercial Molasses Corp. v. New York Tank Barge Corp.*, 314 U.S. 104, 108-109 (1941); *Secretary of Agriculture v. United States*, 350 U.S. 162 (1956). The rule has been held to apply to a shipment of live poultry. *Chicago & E. T. R. Co. v. Collins Produce Co.*, 249 U.S. 186, 191-193 (1919). See also *Commodity Credit Corp. v. Norton*, 167 F.2d 161 (3rd Cir.) (1948); *California Packing Corp. v. The Empire State*, 180 F. Supp. 19 (N.D. Cal. 1960); *Compania DeVapores Inesco, S. A. v. Missouri Pacific R. Co.*, 232 F.2d 657 (5th Cir.) (1956); *Lehigh Valley R. Co. v. State of Russia*, 21 F.2d 396 (2nd Cir.) (1927); *Reider v. Thompson*, 116 F.Supp. 279 (E. D. La. 1953); *United States v. Mississippi Valley Barge Line Co.*, 285 F.2d 381 (8th Cir.) (1960); *Louisiana Southern Ry. Co. v. Anderson, Clayton & Co.*, 191 F.2d 784 (5th Cir.) (1951).

Petitioner's brief contains a quote from *Adams Express Co. v. Croninger*, 226 U.S. 491 (1913) (Pet. Br. 11). If there was ever any doubt over the meaning of this decision, it was clearly resolved by the Court in *Cincinnati, N. & T. P. R. Co. v. Rankin*, 241 U.S. 319 (1916). The Cummins Amendment to Section 20(11) of 1915, among other things, declared any limitation of liability to be unlawful and void with certain exceptions. In *Secretary of Agriculture v. United States*, supra, this amendment was discussed in the brief for the United States and the Department of Agriculture.¹²

¹² The following quotation appears in the brief for the United States and the Secretary of Agriculture (p. 22 n. 6):

"Senator Cummins pointed out that this amendment was designed, not to narrow the common law measure of liability, but

The case of *Austin v. Seaboard Air Line R. Co.*, 188 F.2d 239 (5th Cir. 1951) is cited by petitioner. This suit was brought for damages to a shipment of Christmas trees. The evidence showed that the trees had been cut and left on a siding for some time prior to their loading and that due to heavy rains they had become so wet and heavy that plaintiff had requested the carrier to make some allowance on the freight for such additional weight. The Court found from the evidence that the trees were loaded in a wet

only "to get rid of that part of the common law" which permitted "limitation upon the amount of recovery." 51 Cong. Rec. 9625; and see *id.* at 9778-9. The exact meaning of the statutory reference to damage "caused by" the carrier evoked discussion on the Senate floor, with some Senators expressing fear that the term could be understood to change the "standard of liability by the common carrier of freight" which should "remain that of an insurer" (51 Cong. Rec. 9625, 9780). It was proposed to change "caused" to "transported" in order to remove this possibility, a proposal viewed favorably by Senator Cummins (*id.* at 9625). However, discussion of this change revealed that it might increase the liability of the carrier beyond that of the common law (*ibid.*), and that "caused by" had been interpreted in the Croninger case and others to impose precisely the common law standards sought to be retained (*id.* at 9778-80). The proposal was withdrawn on this understanding and the original language of the Carmack Amendment re-adopted (*id.* at 9779-80).

Clearly recognizing that the phrase "caused by" did not limit the carrier's liability to cases of negligence, but covered liability without fault except where the specific excuses of the common law could be established, the Cummins Amendment permitted the carrier to require notice and filing of claim for losses where it was without fault but forbade such a requirement as a condition of recovery where the loss resulted from the carrier's negligence. See *Barrett v. Van Pelt*, 268 U.S. 85, 89-90; *C. & O. Ry. Co. v. Thompson Mfg. Co.*, 270 U.S. 416, 422. The proviso forbidding the notice requirement in cases of negligence was repealed in 1930 (46 Stat. 251), but the repeal does not diminish the significance of the original provision in its demonstration of the scope of the liability under Section 20 (11)."

condition; that their damp condition when loaded, combined with the gradual increase in temperature while the shipment was en route, caused the damaged condition of the trees and that the injury was not caused by the carrier, but that all reasonable care and diligence had been exercised by the carriers in the transportation of the shipment. The case merely holds that the carrier sustained its burden of proving that the damage was due to an excepted cause and that it was guilty of no breach of contract contributing to such damage.

Hamilton Foods v. Atchison, Topeka & Santa Fe Ry. Co., 83 F. Supp. 478 (S. D. Cal. 1948), cited by petitioner, was affirmed in 173 F.2d 573 (9th Cir. 1949). In affirming the Court stated only that they found no reversible error in the lower Court's opinion. Certain language of the lower Court is not, at least to respondent, entirely clear. Apparently, one thousand cases of shrimp were shipped and 550 of them arrived in good condition at Los Angeles. The shipper trucked 410 of the remaining 450 cases from Los Angeles to San Francisco in a refrigerator truck belonging to shipper. Upon arrival in San Francisco these cases were found to be in a damaged condition and the Court held that such damage was due to fault of shipper in opening the car at Los Angeles and trucking the shrimp to San Francisco. As to the remaining 40 cases, the Court awarded plaintiff a judgment for their value.

In its decision in the instant case, the Supreme Court of Texas refused to follow the *Itule* case (R. 243) and distinguished *Atlantic Coast Line R. Co. v. Georgia Packing Co.*, 164 F.2d 1 (5th Cir. 1947); *Delphi Frosted Foods Corp. v. Illinois Cent. R. R.*, 89 F.Supp. 55 (W.D. Ky.

1950), aff'd, 188 F.2d 343 (6th Cir. 1951), cert. denied, 342 U.S. 833 (1951) and *Trautmann Bros. Co. v. Missouri Pac. R. R.*, 312 F.2d 102 (5th Cir. 1962) (R. 241-242).

That the Supreme Court of Texas properly construed the opinion of the Fifth Circuit in the *Trautmann Bros.* case is further evidenced by recent decisions of that court which hold the rule to be exactly as contended by respondent. In *Thompson v. James McCarrick Co., Inc.*, 205 F.2d 897 (5th Cir. 1953) the Court on p. 900 stated:

"In an action brought under the Carmack Amendment, 49 U.S.C.A. Sec. 20(11), all the shipper and holder of a bill of lading is required to do to establish a 'prima facie' case is to show delivery in good condition, arrival in damaged condition, and the amount of his damages, whereupon the burden shifts to the carrier to show the cause of damage and that it is not liable therefor."

See also *Yeckes-Eichenbaum, Inc. v. Texas Mexican Ry. Co.*, 263 F.2d 791 (5th Cir. 1959), cert. denied, 361 U.S. 827, and *Southern-Plaza Express v. Harville*, 233 F.2d 264 (5th Cir. 1956).

The opinion of House of Lords, *F. O. Bradley & Sons Limited v. Federal Steam Navigation Co. Ltd.* appearing in Petition for Writ of Certiorari, Appendix p. 38a, is readily distinguishable. The Court held that the evidence showed that the apples were not fit to make the voyage in an ordinary way and, therefore, the damage was well within the words "resulting from . . . inherent quality or vice."

(Pet. for Cert. 39a).¹³ It is difficult to understand the relevance of citing a case where the court has found upon the evidence that the defense of inherent vice was established in a case where a jury has affirmatively found to the contrary.

This brings us to the decision of the Court in *Larry's Sandwiches, Inc. v. Pacific Elec. Ry.*, 318 F. 2d 690 (9th Cir. 1963). This opinion is wrong. It is in conflict with all of the Federal Court cases heretofore cited. It is the one Federal Court case which states the rule exactly as petitioner contends it to be. While the Court cites *Secretary of Agriculture v. U. S.*, *supra*, it disregards this Court's holding in that case.

As authority for its holding that the carrier need only prove its own compliance with the tariff and the shipper's instructions, the Court cites Rule 130 and Rule 135 of the Perishable Protective Tariff and four cases. These cases are *U. S. v. Reading Co.*, 289 F. 2d 7 (3rd Cir. 1961); *Illinois Packing Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 236 F. 2d 908 (7th Cir. 1956); *Delphi Frosted Foods Corp. v. Illinois Central R. Co.*, 188 F. 2d 343 (6th Cir. 1961) and *Chesapeake & O. R. Co. v. Thompson Mfg.*

¹³ Petitioner in its discussion of this case says:

"As the Court put it, it was enough that the apples 'decayed not because of the ship or of the route, but because they were apples . . .'" (Pet. Br. 19).

The Court held that the damage was caused not because of the ship or of the sea, or of the route, but because "they were apples which were not fit to make the voyage in an ordinary way." (Pet. for Cert. 39a, 54a). (Emphasis added). Petitioner's omission in quoting from the case of the above emphasized words distorts completely the holding in the case.

* *Co.*, 270 U. S. 416 (1926), none of which support the Court's conclusion.

In the Reading Company case three carloads of beef had arrived at destination and were being held for loading on a ship. The parties stipulated that if the carrier had a duty, under the applicable tariff provision, to ice the car during this waiting period, the shipper was entitled to recover, but not otherwise. The Court held that under the tariff the carrier did not have the duty to ice. *U. S. v. Reading Co.*, 184 F. Supp. 206 (E. D. Penn.). On appeal, the government argued that the stipulation it voluntarily had entered into was not binding and that the carrier should be held liable under the Carmack Amendment. The Third Circuit Court of Appeals refused to allow the plaintiff to escape the clear language of the stipulation holding that to do so would discourage litigants from entering into a stipulation for fear that one of them, when faced with an adverse decision, might attempt to repudiate it. The case has nothing to do with the point under consideration. Actually, the shipper could not have prevailed even had it not entered into the stipulation. The tariff, which was valid, obligated the plaintiff to ice the car while awaiting export. Since the damage occurred to the meat during this period by reason of plaintiff's failure to ice the car, the damage plainly fell under the "fault of shipper" exception.

The next case cited is that of *Illinois Packing Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, supra, brought to recover damages to a carload of frozen beef which plaintiff alleged had defrosted because of defendant's negligence. In this case the car was furnished by the shipper and not

by the carrier. The parties stipulated that at origin the meat was in a good and frozen condition, but that upon arrival at destination it was in a partially defrosted condition. Defendant contended that it was not liable because of fault of shipper in furnishing it a defective car and further introduced evidence purporting to show that plaintiff's instructions were complied with. The case was submitted to the jury and resulted in a verdict for the plaintiff upon which the court entered a judgment. On appeal the defendant carrier argued that since the evidence showed that the defrosting of the meat resulted from inadequacies in the car furnished by plaintiff and without any negligence on its part, it was entitled to a directed verdict. The Court held, however, that an issue of fact was presented to the jury and, therefore, the lower court had properly refused to direct a verdict for the defendant. The case was reversed only because the trial judge made an erroneous statement to the jury concerning some prior testimony of a witness. Neither this case nor the *Delpbi Frosted Foods Corp.* case, *supra*, wherein shipper failed to establish that the fruit was in good condition at origin, support the decision in the *Larry's Sandwiches* case.

The only other case cited is *Chesapeake and O. R. Co. v. Thompson Mfg. Co.*, *supra*, 279 U. S. 416 (1926). The *Itule* case, the *Delpbi Frosted Foods Corp.* case and the *Georgia Packing Co.* case, *supra*, also cite as authority the *Thompson Mfg. Co.* case. This case, holding as it does the law exactly as contended by respondent, is nevertheless for some reason apparently difficult for some courts to understand. At the time the bill of lading exempted the carrier from liability unless the shipper filed a claim for

damages within four months after delivery of the property. However, under the Cummins Amendment of 1915, the filing of a claim was not required as a condition precedent to recovery if the damage was due to the negligence of the common carrier.¹⁴ Shipper did not file a written claim and the suit was brought more than four months after the shipment had been delivered.

No attempt was made by the shipper to prove any negligent conduct on the part of the carrier. A jury found that the damage was not due to the act of God, the public enemy, or the act of the shipper or the nature of the goods themselves. Shipper argued that this verdict of the jury established a conclusive presumption of carrier's negligence and, therefore, no notice of claim was necessary.

Correctly holding that if this were true the plain purpose of the amendment would be defeated, the Court said:

"It is sometimes said that the basis of the carrier's liability for loss of goods or for their damage in transit is 'presumed negligence.' *Hall v. Nashville & C. R. Co.*, 13 Wall. 367, 372, 20 L. Ed. 594, 596. But the so-called presumption is not a true presumption, since it cannot be rebutted, and the statement itself is only another way of stating the rule of substantive law that a carrier is liable for a failure to transport safely goods intrusted to its care, unless the loss or damage was due to one of the specified causes. See *Memphis & C. R. Co. v. Reeves*, 10 Wall, 176, 189, 19 L. Ed.

¹⁴ Since 1930 the bill of lading has required that as a condition precedent to recovery, claims must be filed within nine months. There is no provision requiring either that a notice of claim be filed or excusing the filing of a claim if carrier is negligent. See Sec. 2(b) of the bill of lading contract (R. 159-160)

909, 912; *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 376, 21 L.Ed. 627, 639, 10 Am. Neg. Cas. 624; *Bank of Kentucky v. Adams Exp. Co.* 93 U. S. 174, 181, 23 L.Ed. 872, 875.

We do not consider that the phrase 'carelessness or negligence' of the carrier, as used in the Cummins Amendment in exempting shippers from giving written notice of a claim for damage, has any reference to the conclusive 'presumption' to which we have referred. If such were the meaning of the statute, every case of carrier's liability for damage in transit would be a case of presumed negligence, and proof of written notice of claim for damage required by the bill of lading would always be dispensed with, and the plain purpose of the amendment would be defeated. We think that by the use of the words 'carelessness or negligence,' it was intended to relieve the shipper from the necessity of making written proof of claim when, and only when the damage was due to the carrier's actual negligent conduct, and that by carelessness or negligence is meant not a rule of liability without fault, but negligence in fact. See *Barrett v. Van Pelt*, *supra*.

Still speaking of the negligence required to be proven to avoid the necessity for filing a claim, the Court stated that the shipper had the burden of proving the carrier negligent as one of the facts essential to recovery. This is a statement which is often quoted out of context in the cases.

On the point under consideration, the Court, on page 423, stated:

"The trial court properly submitted to the jury the question whether the damage was due to an act of God or the public enemy or to the inherent condi-

tion of the stoves, *since upon the answer to it depended the liability of the carrier, provided the shipper was entitled, under the Cummins Amendment, to maintain suit without giving the stipulated notice.* But the court erroneously instructed the jury that if they found that the damage was not due to these causes, they might return a verdict for the respondent, thus, in effect, resolving the issue of negligence in favor of the respondent." (Emphasis added).

As previously pointed out, petitioner concedes that at common law the same rule was applicable to both perishable and nonperishable commodities. The Association of American Railroads, however, in its brief as amicus curiae, takes the novel position that proof by a carrier of freedom from negligence constituted a complete defense to a suit for damages to perishables at common law (A.A.R. Br. 4).

Both petitioner and the A.A.R. carefully avoid use of the word "damage" in describing the condition at destination. Petitioner refers throughout its brief to "spoilage and decay" whereas the A.A.R. apparently prefers use of the term "deterioration or decay." The argument that decay in a perishable commodity automatically places it within the inherent vice exception serves only to obscure the basic question under consideration. The honeydew melons were damaged to a much greater extent by light to dark brown discoloration than they were by decay (Pl. Ex. 5, R. 173). It is undoubtedly this damage that the A.A.R. refers to as deterioration and the petitioner as spoilage.

The argument that the arrival of a car of perishables in a spoiled condition automatically places it within the "inherent vice" exception cannot be reconciled with the

decision in *Larry's Sandwiches, Inc. v. Pacific Elec. Ry.*, 318 F. 2d 690 (9th Cir. 1963). Certainly it cannot be contended that the thawing out of a frozen commodity is an inherent vice. Assume a shipper orders the vents open on a car moving through freezing temperatures and the commodity arrives frozen and worthless. Would the damaged or spoiled condition be due to an inherent vice in the commodity or would not the carrier resort to the simple expediency of absolving itself from liability by showing that the damage occurred through fault of shipper.

B. UNDER THE TERMS AND CONDITIONS OF THE BILL OF LADING CONTRACT THE CARRIER ASSUMES LIABILITY FOR ALL DAMAGE UNLESS IT IS ABLE TO PROVE THAT THE DAMAGE FALLS WITHIN ONE OF THE EXCEPTIONS SPECIFIED THEREIN.

Subject to certain exceptions, a common carrier is absolutely liable under the common law for loss or injury to goods received for carriage. *Secretary of Agriculture v. United States*, supra, 13 C.J.S. Sec. 71, p. 131-136. Sec. 1 (b) of the bill of lading contract provides that the carrier shall not be liable for damage caused by the act or default of the shipper or for natural shrinkage. It further provides that except in case of negligence of the carrier, it shall not be liable for damage resulting from a defect or vice in the property. There are other exceptions, but these are the only ones relied upon by petitioner in this case (R. 5). For all other damage, carrier agrees in Sec. 1(a) that it shall be liable as at common law.

Petitioner, in effect, says that if a carrier shows it is not negligent, the carrier is not liable for any damage to the shipment. It is impossible to reconcile such contention with either the bill of lading contract or with petitioner's statement that the carrier remains liable for damage not arising out of the nature of the goods. Petitioner, as an example, states that the carrier would be liable for injury accompanied by breaking of the crates in which vegetables or fruits are shipped (Pet. Br. 15-16). We assume that petitioner would also agree that a carrier is liable for injury, such as bruising, even though the crate is not actually broken. In this case there is evidence that discoloration on honeydew melons results from bruised spots and slight abrasions (R. p. 80, 114, 152-153).

In other words, it is apparent under the terms and conditions of the bill of lading that unless carrier can first prove that the damage was due to one or more of the excepted causes, the manner in which the carrier handled the car is immaterial. Petitioner correctly states the bill of lading exempts the carrier, absent negligence, for loss arising from the inherent vice or nature of the goods (Pet. Br. p. 17). The identical bill of lading is used in the shipment of nonperishable commodities, and yet for damage to a nonperishable commodity resulting from inherent vice or nature of the goods, apparently petitioner concedes that the burden of proving that such was the cause would be on the carrier.

If petitioner is correct, what purpose would there be in having the exception for a defect or vice in the property? Why would a carrier allege or attempt to prove that the damage resulted from a defect or vice in the property?

There is no question but that if carrier is negligent it is liable regardless of the cause of the damage. If, on the other hand, it can absolve itself of all liability by showing freedom from negligence, why bother with testimony about a vice or defect.

In an attempt to avoid the plain language of the bill of lading contract, the A.A.R. states that the common law relieves a railroad of liability for the deterioration or decay of perishables where the services of the railroad have been performed without negligence (A.A.R. Br. 7-9). Even the cases cited do not support such statement. These cases are *Larry's Sandwiches, Inc. v. Pacific Electric Ry. Co.*, 318 F.2d 690 (9th Cir. 1963) and *Southern Pacific Company v. Itule*, 51 Ariz. 25; 74 Pac. 2d 38; 115 A.L.R. 1268 (1937).

In the *Larry's Sandwiches* case the Court recognized the common law insurer's obligation of a carrier unless the damage was due, among other things, to inherent vice in the absence of negligence. The Court then based its holding on Rules 130 and 135 of the tariff, stating that they established the tests of negligence.

In the *Itule* case, the Court stated that under the common law the carrier was an insurer of the safe transportation of goods entrusted to its care, unless the damage was due to one of the four specified causes. The Court went on to say that there was one apparent exception to this rule, and that was when the goods transported was livestock. Because the Court thought it to be the fairer and more logical rule, it applied the livestock rule to a carload of tomatoes and held that the carrier, having proven that it exercised reasonable care to prevent damage, satisfied the

requirements of the law in regard to the quantum of proof required to establish a defense to the action. The *Itule* case might be applicable had the honeydew melons moved under a livestock bill of lading.

In *Bills of Lading*, 52 I.C.C. 671 (1919), the Commission, upon its own motion, instituted an investigation into the general subject of the form and substance of the bills of lading. The liability of a common carrier under the common law was stated on page 679 of the opinion. After a full hearing, the Commission prescribed a bill of lading for use in the shipment of both inanimate perishable and nonperishable goods. The form prescribed is in use today and is the one under which the present shipment moved. A different form bill of lading for perishable products, as well as for coal, was considered (p. 688), but in the concluding portion of its opinion, the Commission on page 740, said:

"As stated in an earlier part of this report, certain interests have advocated the prescribing of special forms of bills of lading for perishable products and for coal. We are not convinced, upon consideration of all the facts of record and the arguments made in advocacy of such bills, that they are essential. It is believed that the uniform bills, prescribed will be adequate to care for any peculiar requirements of such traffic.

A uniform livestock contract will be prescribed in a supplemental report and order as soon as practicable after consideration of the record which has been more fully developed through the medium of a further hearing had with that purpose in view."

To this day, the Commission has not prescribed a different bill of lading for perishables.

C. THE INTERSTATE COMMERCE ACT PROHIBITS A CARRIER FROM LIMITING ITS LIABILITY BY TARIFF:

Respondent contends that Rule 130 and Rule 135 of the Perishable Protective Tariff, No. 17, merely elaborate on the exception for damage resulting from a default or vice in the property (Rule 130) and the exception for damage caused by the act or default of the shipper, (Rule 135) (R. 240-241) but that if they be interpreted as lessening carrier's liability, they are void under the express language of the act (49 U.S.C.A. 20 (11)). A tariff so filed "gains nothing from that fact." *Boston & M. R. Co. v. Piper*, 246 U.S. 439, 445 (1918).

The rules are cited by the Court in the *Larry's Sandwiches* case, *supra*, and since the same law and the same bill of lading applies to perishable and nonperishable shipments if there is authority or basis for the rule announced by the court, it must, of necessity, be derived from these rules.

The question in this case is essentially one of burden of proof. If Rule 130 and Rule 135 be construed as authority for petitioner's contention, and change the burden of proof, they would necessarily lessen the carrier's liability and consequently be void, for the rule is that questions of burden of proof relate to substantive rather than procedural rights. *Central Vermont Ry. v. White*, 238 U.S. 507 (1915); *The Malcolm Baxter, Jr.* 277 U.S. 323 (1928).

Petitioner has never, and does not now, make any contention that Uniform Freight Classification No. 4 (A.A.R. Br. 37-39) has any bearing on the question in this case. The bill of lading provided that petitioner would be liable as at common law with certain exceptions (R. 158), and

it is under this contract that the liability of the parties is to be determined. The case of *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411 (1959), cited on page 15 in the A.A.R. brief is not applicable except insofar as this Court reaffirms the rule that at common law a common carrier was liable, without proof of negligence, for all damage to the goods transported by it, unless it affirmatively showed the damage was due to an excepted cause. See footnote 6, page 417.

The Court in the *Larry's Sandwiches* case, *supra*, stated that Rules 130 and 135 established the test of negligence. The failure to recognize that the rules merely elaborate on the bill of lading exceptions undoubtedly accounts for much of the problem that some courts have with these rules. Petitioner cites *Perishable Freight Investigation*, 56 I.C.C. 449 (1920) which investigation resulted in the inclusion of the rules in the tariff. See page 483. Petitioner is correct in stating that it was proposed that the carriers furnishing protective services be absolved of all liability. Such proposal, incidentally, was made by the Director General of Railroads. The Commission naturally refused to permit any such tariff, recognizing that even if it did, the tariff would be void. The Commission on page 482 stated:

"For this reason many of the declarations in the tariff which deal with this matter of liability state with approximate accuracy what we believe to be the law. But such declarations can have no controlling effect, for the carrier's liability for loss or damage is determined by the law. Nothing can be added to or subtracted from the law by limitations or definitions stated in the tariffs, and this was admitted by counsel for the Director General. There is the constant risk, therefore, if such declarations

are included, of misstating the law and misleading the parties to no good purpose."

The Commission agreed that some warning to shippers that a carrier was not liable for the inherent tendency of perishable goods to deteriorate or decay, nor were carriers liable if the instructions given by the shipper for transportation were improper, might be desirable. 56 I.C.C. 449, 483.

Finally, in its summary of conclusions, on page 614, the Commission stated that the proposed tariff contained numerous provisions scattered through both the general and special rules, defining or seeking to limit the carrier's liability for loss or damage; that this liability is determined by the law, and cannot be changed by declarations or definitions stated in tariff. The Commission then said:

"There is the constant risk, therefore, if such declarations are included, of misstating the law and misleading the parties to no good purpose. In general, it is our conclusion that such provisions should be eliminated, but we think it desirable that shippers should be warned that where they direct in some measure the extent or character of the service and damage results which may be ascribed to such directions, the carriers can not be held liable. A general statement of this character is suggested."

Petitioner apparently feels that any damage to perishables falls within the inherent vice exception (Pet. Br. 23). Petitioner says that the protective tariff would be unintelligible except against the background of a common law rule which exonerates carrier from liability for damage in the form of spoilage and decay where it can prove its free-

dom from negligence and its compliance with the shipper's instructions. Otherwise, according to petitioner, the carrier would be absolutely liable if protective services were not requested. (Pet. Br. 23). Petitioner fails to understand that in such a case the carrier would not be liable but its freedom from liability would be derived not from the inherent vice or defect exception, but from the fault of shipper in failing to request proper protective services. Presumably, a shipper could ship a car of spinach in the middle of summer loaded in a car without ice and instruct carrier to keep the vents closed. The car would undoubtedly arrive at destination some five or six days later overheated, cooked and worthless. Such condition is not the result of an inherent vice or defect, but the fault of shipper and carrier could easily prove that it was not liable for the ensuing damage.

D. IF A CARRIER FAILS TO PROVE THAT THE DAMAGE WAS DUE TO AN EXCEPTED CAUSE IT IS ONLY PROPER THAT IT BE CHARGED WITH THE LOSS.

There are many reasons, in addition to those previously mentioned, why it is only fair that the carrier should have to prove that the damage was due to a cause for which it is not liable. A contrary rule would make it impossible in a large majority of cases for a shipper to ever recover unless the carrier saw fit to admit that it was negligent. Under petitioner's theory, a shipper would, for the first time in the history of carrier law, be unable to recover damage for a loss occasioned by something other than act of God, fault of shipper or vice or defect in the property.

Petitioner does not even concede liability for breach of contract, contending, as it does, that there must be a negli-

gent breach. Vents on a car might be improperly closed and an employee of the carrier might make an honest mistake and note them open. For such a mistake the shipper and not the carrier would be the one who would bear the loss. The same would be true for damage occasioned by acts of third parties. Assume that a car of onions moving with the vents open is placed on a hold track awaiting transfer to a connecting carrier when an adjacent warehouse is set on fire by arsonists resulting in the onions becoming overheated and spoiled even though the railroad acted promptly in switching the car out of danger. Under petitioner's argument, the carrier, not being negligent in any particular, would be exempt from all liability.

What is the position of petitioner with regard to the absence of records by reason of their being lost, destroyed, or misplaced and with regard to proof concerning services which should properly be accorded the shipment but about which no record is made? A good example is the absence of a fan record in the case under consideration (R. 97).¹⁵ At destination the fans were shown to be in an "on" position which is the only record of the position of the fans in the

¹⁵ Petitioner's expert witness, J. A. Friend, was, before he retired, Superintendent of Refrigerator Service of the American Refrigerator Transit Company (R. 85). For about thirty years he was a member of the National Perishable Freight Committee which organization publishes the Perishable Protective Tariff and makes recommendations for the rules on all perishable freight in the United States (R. 86). Mr. Friend testified:

"Q. What is your record as to the running of the fans in each case?

A. We do not record records on the operation of the fans because there is no tariff requirement that the operation of the fans be recorded. Our instructions are to operate these cars with fans on in all cases unless otherwise specified by the shipper."

entire case (P. Ex. P-5, R. 11, 172). The same exhibit shows that the temperature of the honeydew melons located in the top of the car was 46° F. whereas, the melons at the bottom of the car had a temperature of 40° F. The fans should properly have been on during the entire period of transportation as their purpose is to give better refrigeration and more uniform distribution of air through the car (R. 97)¹⁶. According to petitioners expert, prior to the installation of fans on refrigerator cars, it was not uncommon for the top and the bottom temperature to vary as much as 6 to 8 degrees but with fans you come very close to having an even temperature at the top and bottom (R. 97-98). With fans, if there is a difference in temperature, the produce at the top of the load is cooler than at the bottom (R. 98). In sum, from the evidence presented by the carrier, it would appear that if the carriers had had a fan record, it would have reflected an error.

Ordinarily the original record of the service accorded a car is prepared by the employee whose duty it is to perform such service. As a result, shipper's cause of action would in a large number of instances depend solely upon a railroad employee turning in a written record acknowledging that he had improperly performed his duty. The Interstate Commerce Act made it possible for a shipper to treat the originating or the delivering carrier as though it had handled the shipment from origin to destination. The legal effect of this provision was not to confer upon a shipper any new kind of contractual right, but to extend to him rather a new and additional kind of remedy for the enforcement of his pre-existing contractual rights. To pro-

¹⁶ See also Protection of Rail Shipments of Fruits and Vegetables, Agriculture Handbook No. 195, p. 40-41 (July 1961).

tect the initial or the delivering carrier it was necessary that 49 U.S.C. Sec. 20 (f2) be enacted. This act permits the charging of the entire loss to the carrier on whose line the damage was sustained. When none of the carriers admit to any fault the amount paid is prorated on a mileage basis. Assuming the majority of carriers to be willing to pay for their own mistakes, they are reluctant to pay the entire loss if they feel a connecting carrier's records are of questionable accuracy. The rule of strict accountability is therefore even more necessary today than it was at common law.

It has been argued that carrier's records are entitled to greater credibility because falsification of same is made a crime punishable by fine and imprisonment. Most, if not all, refrigerator cars are owned by separate companies who supply the cars to the carriers and furnish all of the protective services requested by the shipper (R. 85). It has been held that such a company cannot be criminally liable under the Interstate Commerce Act for failure to truly keep or for falsifying icing records. *United States of America v. Fruit Grower's Express Company*, 279 U.S. 363 (1929).

What has been said deal with the reasons for the rule by virtue of the car being in the exclusive possession of the carrier. The A.A.R. argues that proof by the carrier of freedom from negligence should exonerate the carrier because the shipper is peculiarly knowledgeable of the commodity's condition at and prior to the time of shipment (A.A.R. Br. 27-28). Petitioner states that the shipper can establish a prima facie case of liability, as he did here, simply by showing that the fruit was in good condition at the time of shipment, but spoiled upon arrival (Pet. Br.

16). The error in such argument lies in the fact that there is nothing at all simple about proving delivery to the carrier in good condition.

A shipper is forced to rely on carrier's records in order to determine how a car was handled, whereas, contrary to the argument of petitioner, the condition of the commodity at origin is by no means in the exclusive possession of the shipper. Actually, there is very little, if any, evidence pertaining to the condition of the shipment which is not available to the carrier and in many respects the carrier is in a better position than shipper to determine the carrying quality of a commodity.

The Western Weighing & Inspection Bureau¹⁷ is an agency of the carriers (R. 147). Its district inspector resides in the Rio Grande Valley of Texas. In the course of his business, he examines fruits and vegetables loaded in railroad cars for the purpose of determining their quality and condition and has inspected probably thousands of cars of honeydew melons and peppers and, in addition, has made a study of field conditions and growing conditions of fruits and vegetables in the Rio Grande Valley (R. 137-138). He, or inspectors working under him, have, of course, the right to inspect at origin every car that is shipped. Information about the weather and climatic conditions are readily available. Since each season the harvest of each commodity results in the movement of a number of cars by numerous shippers, the railroad is in possession of records and destination inspections of all of the cars shipped and can study their outturn to determine if there

¹⁷ The Western Weighing & Inspection Bureau is erroneously referred to throughout the record as the Western Wing & Inspection Bureau.

were any general field defects, whereas shipper is generally limited to the cars which he personally handles. Also, the railroad maintains an agent who issues shipper a bill of lading. While such agent may not be a pathologist, since the crates as well as every melon in the crates are visible, it would hardly require an expert to note if 18% of the honeydews were discolored and decayed and if so, certainly the agent would not have issued a bill of lading acknowledging their receipt in apparent good order.

Petitioner states that in the case of loss not arising out of the nature of the goods the rule remains that the carrier cannot escape liability by proving its freedom from fault (Pet. Br. 15-16). Evidently, damage occasioned by the thawing of a frozen shipment is considered by petitioner to be a loss arising out of the nature of the goods. Petitioner says that "injury accompanied by breaking of the crates in which the vegetables or fruits are shipped" is an example of a loss not arising out of the nature of the goods. The case of *Yeckes-Eichenbaum, Inc. v. Texas Mexican Ry.*, 263 F.2d 791, 794 (5th Cir.), cert. denied, 361 U.S. 827 (1959) is cited in support of this statement. In the first place there is no significance to the term "accompanied by breaking of the crates". No claim is made for damage to the crate itself. Crates can be and are repaired. The melons can become bruised, cut or cracked without necessarily damaging the crate and it is for this damage that a claim is made. Petitioner states that the *Yeckes-Eichenbaum* opinion clearly demonstrates the distinction between breakage and spoilage cases. What is the distinction between breakage and spoilage cases that is made in this opinion? The district court opinion in the *Yeckes-Eichenbaum* case is reported in 165 F. Supp. 204. On p. 205 the Court says:

"Upon arrival at Eastern destinations crate breakage was noted in each of the cars which had caused damage to the cantaloupes. Plaintiff's sue for this damage caused by the breakage."

On appeal, *supra*, the Fifth Circuit stated that damage resulting from breakage to crates was a matter entirely different from spoilage due to inherent vice. The Court did not say any different rules would apply. Apparently the Court was attempting to distinguish *Texas & P. Ry. Co. v. Empacadora de Ciudad Juarez, S.A.*, 309 S.W.2d 926 Ct. Civ. App. Tex. (1957) which case was overruled by the Supreme Court of Texas in its decision in the instant case

In *Trautmann Bros. Co. v. Missouri Pacific Railroad Co.*, 312 F.2d 102 (5th Cir. 1962), the Court on page 104 says that a common carrier is not absolutely liable for spoilage or physical deterioration during the course of shipment. Following this statement, in a footnote, the Court has this to say:

"There is an obvious distinction between damage of that type and damage resulting from crate breakage or physical breakage."

In support of this statement the Court cites the *Yeckes-Eichenbaum* case, but does not further enlighten us as to what the "obvious distinction" is.

Finally, if the carrier can completely exonerate itself by merely stating that according to its records there is no negligence the shipper would even be deprived of his day in Court. Presumably, if such were the rule a shipper in addition to pleading a delivery in good and an arrival in bad condi-

tion, would have to at least alternatively, allege specific acts of negligence on the part of the carrier. It would be an impossibility in all of the so-called "clear record" cases to either allege or prove specific acts of negligence. If a shipper had two cars containing identical commodities, which arrived at destination with one showing damage and the other in good condition, a shipper might testify that in his opinion the vents on the damaged car were not properly manipulated or the icing instructions were not complied with or the car itself was defective or that it might be a combination of these things, but of necessity his testimony would be so speculative as to undoubtedly render it inadmissible and entitle the carrier to an instructed verdict.

CONCLUSION

For the reasons stated, the judgment of the Texas Supreme Court should be affirmed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

October Term, 1963

No. 292

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner,

v.

ELMORE & STAHL,
Respondent.

BRIEF OF UNITED FRESH FRUIT & VEGETABLE ASSOCIATION,
TEXAS CITRUS AND VEGETABLE GROWERS AND SHIPPERS,
CALIFORNIA GRAPE & TREE FRUIT LEAGUE, NORTHWEST
HORTICULTURAL COUNCIL, FLORIDA FRUIT & VEGETABLE AS-
SOCIATION, INTERNATIONAL APPLE ASSOCIATION, INC., WEST-
ERN GROWERS ASSOCIATION, GROWERS AND SHIPPERS LEAGUE
OF FLORIDA, SOCIETY OF AMERICAN FLORISTS AND ORNAMENTAL
HORTICULTURISTS, NATIONAL FISHERIES INSTITUTE, INC.
and EASTERN FREEZERS ASSOCIATION, AS *AMICI CURIAE*, IN
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TABLE OF CONTENTS

	PAGE
I. INTEREST OF AMICI CURIAE	1
II. QUESTION PRESENTED	2
III. SUMMARY OF ARGUMENT	3
IV. ARGUMENT	5

POINT 1—At common law a carrier is liable for damage to merchandise which it transports regardless of the exercise of due care, unless it is established that the damage or loss resulted from one of the recognized and permitted exceptions. Where the plaintiff has established its <i>prima facie</i> case, the carrier bears the burden of bringing the cause of the loss within one of those exceptions	5
---	---

POINT 2—The common law rule of carrier liability as set forth in Point 1, <i>supra</i> , applies to the carriage of perishables	10
---	----

POINT 3—The rule of liability asserted by the Supreme Court of Texas in the opinion below is in accord with the bill of lading and the applicable tariff. If said bill of lading and tariff are to be interpreted as modifying the common law rule, they would be violative of the Interstate Commerce Act (49 U. S. C., Section 20(11))....	15
--	----

A. The bill of lading and the tariff <u>do not</u> affect the common law rule of liability	15
--	----

B. Section 20(11) of the Interstate Commerce Act (49 U. S. C.), prohibits a carrier from impairing its common law liability by "contract, receipt, rule, regulation or other limitation of any character whatsoever"	21
--	----

POINT 4—Proof of the nature of the damage to a perishable does not establish the defense of inherent vice. The carrier is required to establish that an inherent defect or vice in the perishable caused the damage	23
---	----

POINT 5—There is no basis in sound public policy to provide a different rule of carrier liability in respect to the carriage of perishables in contrast to the transportation of other commodities	26
--	----

CONCLUSION	34
------------------	----

CERTIFICATE OF SERVICE	35
------------------------------	----

APPENDIX

Description of <i>Amici Curiae</i>	1a
--	----

TABLE OF AUTHORITIES

	PAGE
Cases:	
Akerly v. Railway Express Agency, Inc., 96 N. H. 396, 77 A. 2d 856 (1951)	12, 13
Atlantic Coastline v. Riverside Mills, 219 U. S. 186 (1911)	28
Bank of Kentucky v. Adams Express Co., 93 U. S. 174 (1876)	5
Bills of Lading, The Matter of, 52 I. C. C. 671 (1919) 7, 15, 16, 22n, 26, 28	
Bird v. Palmer, 69 R. I. 388, 33 A. 2d 415 (1943)	22
Bradley, F. O., & Sons Ltd. v. Federal Steam Naviga- tion Co., Ltd., 137 Law Times Rep. 266 (1927)	25
C. & O. Ry. Co. v. Timberlake, 147 Va. 304, 137 S. E. 507 (1927)	12
C. & O. Ry. Co. v. W. C. Crenshaw & Co., 147 Va. 290, 137 S. E. 515 (1927)	12
Chesapeake & Ohio Ry. Co. v. Thompson Mfg. Co., 270 U. S. 416 (1926)	5, 20
Chicago & Eastern Illinois R. Co. v. Collins Produce Co., 249 U. S. 186 (1919)	5
Cincinnati, N. O. & Texas Pacific Ry. Co. v. Rankin, 241 U. S. 319 (1916)	21
Coggs v. Bernard, 2 Lord Raymond 909	27, 28
Commercial Molasses Corp. v. New York Tank Barge Corp., 314 U. S. 104 (1941)	9
Commodity Credit Corp. v. Norton, 167 F. 2d 161 (3rd Cir. 1948)	6, 17, 22
Daido Line, The v. Thos. B. Gonzales Corp., 299 F. 2d 669 (1962)	20n
Folmina, The, 212 U. S. 354 (1909)	25

Galveston H. & S. A. R. Co. v. Wallace, 223 U. S. 481 (1912)	5, 7, 8
Galveston Wharf Co. v. Galveston, Harrisburg & San Antonio Ry. Co., 285 U. S. 127 (1932)	17
Hall & Long v. The Railroad Companies, 13 Wall 367, 80 U. S. 367 (1871)	5, 6
Larry's Sandwiches v. Pacific Electric Railway Co., 318 F. 2d 690 (9th Cir. 1963)	4, 19, 20
Lehigh Valley v. John Lysaght Ltd., 271 Fed. 906, 910 (2nd Cir. 1921), cert. den. 256 U. S. 704 (1921)	22
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N. Y., Phila. and Norfolk R. Co. v. Peninsula Produce Exchange of Maryland, 240 U. S. 34 (1916) ..	21
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Railroad Co. v. Vanell, 98 U. S. 479 (1878)	5
Schnell v. The Vallescura, 293 U. S. 296 (1934) ..	11, 24, 25, 26
Secretary of Agriculture v. U. S., 350 U. S. 162 (1956)	5, 10, 21, 22, 25n
Southern Ry. Co. v. Bateman Fruit Exchange, 173 Ga. 826, 162 S. E. 112 (1931)	12
Tierney v. New York Central & H. R. R. R. Co., 76 N. Y. 305	27
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Statutes:

Carriage of Goods by Sea Act of 1936, 46 U. S. C., Sec. 13	9n
Harter Act, The, 46 U. S. C., secs. 190-196	9n
Interstate Commerce Act (49 U. S. C.) Section 20(11)	3, 9n, 10, 15, 21; 22, 24

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American Association of Railroads

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Perishable Protective Tariff No. 17	
Rule 130	17, 18, 19, 21, 23
Rule 135	17, 18, 19, 21, 23
Rules of United States Supreme Court, Rule 42(2)	1
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Webster's Third International Dictionary	31n

IN THE
Supreme Court of the United States

October Term, 1963

*** No. 292**

MISSOURI PACIFIC RAILROAD COMPANY,

Petitioner,

v.

ELMORE & STAHL,

Respondent.

BRIEF OF UNITED FRESH FRUIT & VEGETABLE ASSOCIATION, TEXAS CITRUS AND VEGETABLE GROWERS AND SHIPPERS, CALIFORNIA GRAPE & TREE FRUIT LEAGUE, NORTHWEST HORTICULTURAL COUNCIL, FLORIDA FRUIT & VEGETABLE ASSOCIATION, INTERNATIONAL APPLE ASSOCIATION, INC., WESTERN GROWERS ASSOCIATION, GROWERS AND SHIPPERS LEAGUE OF FLORIDA, SOCIETY OF AMERICAN FLORISTS AND ORNAMENTAL HORTICULTURISTS, NATIONAL FISHERIES INSTITUTE, INC. and EASTERN FREEZERS ASSOCIATION, AS AMICI CURIAE, IN SUPPORT OF RESPONDENT, ELMORE & STAHL

I. INTEREST OF AMICI CURIAE

The above-named associations hereby file their brief, as *amici curiae*, in this case, pursuant to Rule 42(2) of the Rules of the Supreme Court. This brief is accompanied by the written consent to its filing from counsel for Elmore

& Stahl and the Missouri Pacific Railroad Company, the parties to this action.

The *amici curiae* are trade associations, operating in the United States, consisting of shippers, growers, wholesalers, terminal market operators, brokers, retailers, importers, exporters, and members of allied industries dealing in perishable commodities. A more detailed description of the organization, nature and interest of each is set out in the appendix to this brief. The members of these associations are directly and significantly affected by the legal rules and principles of liability applicable to the transportation of perishables in interstate commerce. The issues presented by the instant case will vitally affect the economic position of all industries dealing in perishables.

II. QUESTION PRESENTED

Where, in an action against a common carrier for damage to an interstate shipment of fruit, the jury finds that the fruit was, when tendered to the carrier for transportation, in good order and condition, and was, on delivery by the carrier at destination, in worse condition than was reasonably to have been anticipated, and where the jury finds further that the damage was not caused by an inherent vice or defect in the fruit, nor by the act or default of the shipper, is the plaintiff entitled to judgment regardless of any finding of the jury relative to negligence of the carrier?

III. SUMMARY OF ARGUMENT

It is an old and well-established rule of the common law that a carrier is liable for damages sustained to goods which it transports, regardless of fault, unless the carrier can establish one of the specified exceptions to liability permitted by law and provided by the contract of carriage. Unless, therefore, in the instant case, the carrier established that the damage to the fruit was caused by an inherent defect or vice in the produce, or by the act or default of the shipper, the respondent was entitled to judgment.

The rule of liability without fault applies to all commodities, including "perishables". All commodities are more or less perishable and the enunciation of a different rule in this context would, in effect, eliminate the established requirement that the carrier establish inherent vice to exonerate itself from liability.

The bill of lading under which the shipment moved and the rules of the tariff applicable to said shipment do not provide a different rule. The bill of lading, by its express terms, provides that the carrier shall be liable as at common law and the tariff rules relied upon by the petitioner do not, by their terms or intent, provide otherwise. The Interstate Commerce Commission, in approving the tariff rules in question, specifically pointed out that it was not authorizing any change pertaining to a rule of liability or to burden of proof.

If either the bill of lading or the rules of the tariff did, in fact, permit the carrier to diminish its common law liability, such contract or rule would be violative of Section 20(11) of the Interstate Commerce Act (49 U. S. C.),

which codifies and imposes the common law rule of liability and specifically prohibits any carrier from limiting or diminishing that liability by contract, rule or otherwise.

Establishing the nature of the damage does not establish its cause. Proof, therefore, that the damage in question was decay, would not establish the defense of inherent vice. The carrier is exonerated from liability only if it establishes a particular cause for the damage from which it is exempted from liability. Proof that decay resulted does not establish that it was caused by an idiosyncrasy, propensity, or quality inherent in the commodity. It is an effect (not a cause), for which no exemption is provided.

The rule of liability, which exonerates the carrier only if it can bring itself within one of the permissible exceptions, reflects sound public policy, wisely enunciated, and long-established. The reversal of this rule would create great mischief, subvert the intention of Congress, and unfairly place in jeopardy the rights of major segments of the shipping public.

The decision of the Supreme Court of Texas in the instant case properly sets forth the applicable federal rules of law, and the conclusions of the court in *Larry's Sandwiches v. Pacific Electric Railway Co.*, 318 F. 2d 690 (9th Cir: 1963), relied upon by the petitioner, are not supported by the authorities therein cited.

IV. ARGUMENT

POINT 1

At common law a carrier is liable for damage to merchandise which it transports regardless of the exercise of due care, unless it is established that the damage or loss resulted from one of the recognized and permitted exceptions. Where the plaintiff has established its *prima facie* case, the carrier bears the burden of bringing the cause of the loss within one of those exceptions.

This Court, on many occasions, has stated and reiterated the rule that at common law a carrier is liable for any damage sustained by commodities which it transports unless the carrier can establish one of the specified exceptions.

Secretary of Agriculture v. U. S., 350 U. S. 162 (1956);

Chesapeake & Ohio Ry. Co. v. Thompson Mfg. Co., 270 U. S. 416 (1926);

Chicago & Eastern Illinois R. Co. v. Collins Produce Co., 249 U. S. 186 (1919);

Galveston H. & S. A. R. Co. v. Wallace, 223 U. S. 481 (1912);

Railroad Co. v. Vanell, 98 U. S. 479 (1878);

Bank of Kentucky v. Adams Express Co., 93 U. S. 174 (1876);

Hall & Long v. The Railroad Companies, 13 Wall 367, 80 U. S. 367 (1871).

Sometimes this doctrine is described as liability without fault, and at other times it is referred to as a conclusive presumption of negligence or breach of duty. Thus,

this Court in *Hall & Young v. The Railroad Companies*, *supra*, at p. 372, stated in referring to a carrier's liability:

"The law raises against him a conclusive presumption of misconduct, or breach of duty, in relation to every loss not caused by excepted perils. Even if innocent in fact he has consented by his contract to be dealt with as if he were not so."

In the instant case the petitioner asserts that although it failed in its attempt to bring the cause of the damage within one of the specified exceptions, the jury's finding relating to due care exonerated it from liability. However, as pointed out by the Circuit Court of Appeals (3rd Cir.) in *Commodity Credit Corp. v. Norton*, 167 F. 2d 161 (1948), such a position is unfenale. The Court stated:

"At common law, the common carrier is held to strict accountability, being absolutely liable for loss or damage to the goods surrendered to its custody without regard for the exercise of due care, unless, of course, the damage or loss flows from an excepted cause. *Chicago & Eastern Illinois R. Co. v. Collins Produce Co.*, 1919, 249 U. S. 186, 192, 39 S. Ct. 189, 63 L. Ed. 552. The carrier is thus made the virtual insurer of the cargo.

As the cases already cited plainly establish, the carrier is responsible without regard to the exercise of due care even though the damage or loss be occasioned by the independent act of third persons. See *United States v. Morgan*, 1850, 11 How. 154, 162, 52 U. S. 154, 162, 13 L. Ed. 643. The manner of handling the cargo, therefore, would be entirely irrelevant except in the event of an affirmative finding by the jury of the existence of a latent defect, or unless the damage or loss

is brought within another excepted peril which would give rise to the application of the rule of negligence. Consequently a finding that there was 'no rough handling' would not require a determination of the cause in favor of the defendant, sans the additional finding of a latent defect." (pp. 164-165)

The Interstate Commerce Commission, in considering bills of lading to be utilized by carriers, described the common law rule of liability in *The Matter of Bills of Lading*, 52 I. C. C. 671, 679 (1919) as follows:

"Under the common law as it has been developed to the present day in its application to modern transportation conditions and practices, there has been little or no relaxation of the rigor of the rule of the common carrier's liability, but the exceptions have been extended to include loss, damage, and injury due to other causes, and a common carrier is now regarded as an insurer of the goods entrusted to its care and custody for transportation and as liable for all loss, damage or injury occurring to the goods while they are held by it in its capacity of a common carrier, except when such loss, damage or injury is caused by: (a) the act of God; (b) the public enemy; (c) the act of the shipper himself; (d) public authority; (e) or the inherent vice or nature of the goods."

In a suit against a common carrier, the plaintiff is not required to both prove its *prima facie* case and disprove the existence of a defense (*Galveston H. & S. A. R. Co. v. Wallace*, 223 U. S. 481 (1912)). If the damage is unexplained, the plaintiff is entitled to recover (*The Patria*, 125 Fed. 425, 426 (1903), *aff'd* 132 Fed. 971 (2nd Cir. 1904)). As stated by Michie on Carriers (1915), Vol. 1, section 989, p. 730:

"So, where freight is lost or damaged while in the possession of a carrier, it cannot escape its common law responsibility by merely proving that the loss or damage was not occasioned by its negligence, or that it had used the utmost care and diligence. Carriers of goods being insurers are not relieved from liability by the fact that loss or damage happened from some unknown cause, or could not have been avoided by any human vigilance."

This Court stated in *Galveston H. & S. A. R. Co. v. Wallace, supra*:

"The plaintiffs were not obliged both to prove their case and to disprove the existence of a defense. The carrier and its agents, having received possession of the goods, were charged with the duty of delivering them, or explaining why that had not been done. This must be so, because carriers not only have better means, but often the only means, of making such proof. If the failure to deliver was due to the act of God, the public enemy, or some cause against which it might lawfully contract, it was for the carrier to bring itself within such exception. In the absence of such proof, the plaintiffs were entitled to recover, and the judgment is affirmed." (p. 492)

The principles enunciated above apply to the common law in all fields of transportation, including maritime law. *Gilmore & Black, The Law of Admiralty* (1957), states at p. 119:

"The general law of maritime carriage made the public carrier of goods by sea absolutely responsible for their safe arrival, unless loss or damage was caused by the Act of God or of the public enemy, or by the inherent vice of the goods or the fault of the shipper—and (even where the loss was caused by one of these) the car-

rier was not negligent or otherwise at fault. Except for the qualification indicated this liability did not rest on fault. All the shipper had to do to make his case was to prove receipt for carriage in good order, and non-delivery or delivery in bad order. If the carrier could not show that one of the 'exceptions' just listed was the cause of the loss or damage, he had to pay."¹

This Court stated in *Commercial Molasses Corp. v. New York Tank Barge Corp.*, 314 U. S. 104 (1941), at p. 109:

"* * * one who has assumed the obligation of a common carrier can relieve himself of liability for failing to carry safely only by showing that the cause of loss was within one of the narrowly restricted exceptions which the law itself annexes to his undertaking, or for which it permits him to stipulate. The burden rests upon him to show that the loss was due to an excepted cause and that he has exercised due care to avoid it, not in consequence of his being an ordinarily 'baileé' but because he is a special type of bailee who has assumed the obligation of an insurer. *Schnell v. The Vallescura*, 293 U. S. 296, 304, and cases cited. See *Coggs v. Bernard*, 2 Ld. Raym. 909, 918.

For this reason, the shipowner, in order to bring himself within a permitted exception to the obligation to carry safely, whether imposed by statute or because he is a common carrier or because he has assumed it

1. The general law of maritime carriage has been modified by statute (see, e.g., *The Harter Act*, 46 U. S. C. Secs. 190-196; Carriage of Goods by Sea Act of 1936, 46 U. S. C., Sec. 13 *et seq.*) in order to accommodate the problems of competition and uniformity in international commerce by water. This Act represents a compromise of the respective commercial and international maritime interests. See discussion, *Gilmore & Black, The Law of Admiralty*, pp. 122-124. No statute, however, has diluted the common law liability of carriers by rail, and no accommodation with competing foreign or unregulated commerce requires it. The Interstate Commerce Act (49 U. S. C., Sec. 20(11)) has reaffirmed it. See Point 3, *infra*.

by contract, must show that the loss was due to an excepted cause and not to breach of his duty to furnish a seaworthy vessel. *The Edwin I. Morrison*, supra, 211; *The Majestic*, 166 U. S. 375; *Schnell v. The Vallescura*, supra; *The Beeche Dene*, 55 F. 525. Cf. 39 Stat. 539, 49 U. S. C. §88; Uniform Bill of Lading Act, §12. See IX Wigmore on Evidence (3rd ed.) §2508 and cases cited. And in that case, since the burden is on the shipowner, he does not sustain it, and the shipper must prevail if, upon the whole evidence, it remains doubtful whether the loss is within the exception. *The Folmina*, 212 U. S. 354, 363; *Schnell v. The Vallescura*, supra, 306, 307."

POINT 2

The common law rule of carrier liability as set forth in Point 1, *supra*, applies to the carriage of perishables.

The petitioner contends that the federal common law rule of carrier liability as applied to perishables is distinguishable from the general common law rule. However, this Court has never recognized such distinction.

For example, in *Secretary of Agriculture v. U. S.*, 350 U. S. 162 (1956), a case dealing with eggs, this Court noted that it was "conceded" that Section 20(11) of the Interstate Commerce Act codified "the common law rule making a carrier liable without proof of negligence for all damage to the goods transported by it, unless it was affirmatively shown that the damage was occasioned by the shipper, acts of God, the public enemy, public authority, or the inherent nature or vice of the commodity." (n. 9, pp. 165-166). This Court said in respect to an analogous situation in-

volving the approval by the Interstate Commerce Commission of certain proposed tariffs:

"At common law, proof that a case of eggs contained a specified amount of damage for which the carrier was not liable would afford no defense to a damage claim not shown to include that damage. To complete the defense, some showing that the damage claimed included the exempt damage would be required, such as evidence that all of the damage had been found and claimed (p. 167). . . .

By in effect requiring a consignee to prove that his damage claim does not include the exempt damage, the tolerances would impose on the consignee the burden of disproving a defense which at common law it would be the carrier's burden to establish." (p. 169)

This Court, in *Schnell v. The Vallescura*, 293 U. S. 296 (1934), a case involving damage to a shipment of onions, stated:

"In general the burden rests upon the carrier of goods by sea to bring himself within any exception relieving him from the liability which the law otherwise imposes on him. This is true at common law with respect to the exceptions which the law itself annexed to his undertaking, such as his immunity from liability for act of God or the public enemy. See Carver, *Carriage by Sea* (7th ed.) Chap. I. The rule applies equally with respect to other exceptions for which the law permits him to stipulate. *Clark v. Barnwell*, 12 How. 272, 280; *Rich v. Lambert*, 12 How. 347, 357; *The Propeller Niagara v. Cordes*, 21 How. 7, 29; *The Maggie Hammond*, 9 Wall. 435, 459; *The Edwin I. Morrison*, 153 U. S. 199, 211; *The Folmina*, 212 U. S. 354, 361. The reason for the rule is apparent. He is a bailee entrusted with the shipper's goods, with respect to the

care and safe delivery of which the law imposes upon him an extraordinary duty. Discharge of the duty is peculiarly within his control. All the facts and circumstances upon which he may rely to relieve him of that duty are peculiarly within his knowledge and usually unknown to the shipper. In consequence, the law casts upon him the burden of the loss which he cannot explain or, explaining, bring within the exceptional case in which he is relieved from liability. See *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174, 184; *Chicago & Eastern Illinois R. Co. v. Collins Produce Co.*, 249 U. S. 186, 192, 193; *Railroad Co. v. Lockwood*, 17 Wall. 357, 379, 380." (pp. 303-304)

The rule that a carrier transporting perishables is liable regardless of fault, unless he establishes one of the exceptions, is one of broad application (*C. & O. Ry. Co. v. Timberlake*, 147 Va. 304, 137 S. E. 507 (1927), *C. & O. Ry. Co. v. W. C. Crenshaw & Co.*, 147 Va. 290, 137 S. E. 515 (1927), *Perkel v. Pennsylvania R. Co.*, 148 Misc. 284, 265 N. Y. S. 597 (1933), *N. H. Nelson & Co. v. Chic. & N. W. R. Co.*, 102 Neb. 439, 167 N. W. 574 (1918), *Southern Ry. Co. v. Bateman Fruit Exchange*, 173 Ga. 826, 162 S. E. 112 (1931), *Akerly v. Railway Express Agency, Inc.*, 96 N. H. 396, 77 A. 2d 856 (1951)).

In *Southern Railway Co. v. Bateman Fruit Exchange*, *supra*, which involved a shipment of peaches, the Supreme Court of Georgia set forth the rule as follows:

"* * * originally carriers were absolutely liable for the non-delivery, or delivery in bad condition, of goods entrusted to them for transportation, unless the loss or injury was caused by the act of God or the public enemy. In such cases the burden is on the carrier to show that the case is within one of the exceptions.

This general rule was afterwards extended and made applicable to shipments of perishable goods possessing inherent defects, and in these latter cases to escape liability the burden is on the carrier to show that it comes within one of these exceptions." (p. 113)

In *Perkel v. Pennsylvania R. Co.*, *supra*, which involved a shipment of watermelons, the court stated:

"The law adjudges the carrier responsible, irrespective of any question of negligence or fault on his part, if the loss does not occur by the act of God or the public enemy, or fall within an excepted cause. (*Merritt v. Earle*, 29 N. Y. 115; *Heyman v. Stryker*, 116 N. Y. S. 638.)

Common carriers, holding themselves out as shippers of perishable fruit, are held to a higher degree of care than when engaged in the shipment of household goods, or other articles not inherently perishable, and there is no reason why the rule as to burden of proof should not apply since the carrier has the superior ability to furnish the proof as to what caused the damage. (*Fish v. Seaboard Airline Railway*, *supra*; *Pereira v. American Ry. Exp. Co.*, *supra*; *Brennison v. Pennsylvania R. Co.*, 101 Minn. 120, 111 N. W. 945; *Eockens v. United States Express Co.*, 99 Minn. 404, 109 N. W. 834; *Ammon v. Ill. Central RR. Co.*, 120 Minn. 438, 139 N. W. 819; *Presley Fruit Co. v. St. L., I. M. & S. Ry. Co.*, 130 Minn. 121, 153 N. W. 115.)" (p. 288)

In *Akerly v. Railway Express Agency, Inc.*, *supra*, the Supreme Court of New Hampshire, in discussing the principles of liability involving a shipment of eggs, stated:

"In order to defeat (the plaintiff's) right of recovery, the burden is on the defendant to disprove these facts (establishing the *prima facie* case), or to prove that the loss or damage was proximately and

exclusively due to one of the five excepted causes * * * This presumption could not be overcome as a matter of law, by proof which tended to show that defendant was not in fact negligent unless it was sufficient to prove that the damage was due proximately and exclusively to the inherent nature of the (goods) * * * (p. 861)²

The petitioner has suggested that there is a modern rule of liability which permits the carrier to exonerate itself in a case involving the transportation of perishables upon proof of freedom from negligence. This purported modern rule, asserts the petitioner, stems from the large-scale development in relatively recent years of long distance transportation of fresh fruits and vegetables. The fact is that the interstate shipment of fresh fruits and vegetables by rail throughout the United States is, and has been, a characteristic of the railroad industry throughout this century, but that such shipments by rail have decreased in relatively recent years, rather than increased.³

The decisions upon which the petitioner relies as constituting a so-called "modern rule" either do not promulgate a different rule than the long established common law rule, or are based upon a misconception or misunderstanding of the authorities upon which they in turn rely.

2. The Supreme Court of New Hampshire, in referring to *Southern Pacific Co. v. Itule*, which is relied upon by the petitioner in the within case, questioned the authority of that case, stating that there was no indication that the theory of the case "has been adopted by the federal courts, and the Itule case intimates that it has not" (p. 861).

3. Circular FCD-1300, issued by the American Association of Railroads, indicates that in the year 1947, 1,053,566 cars of fresh fruits and vegetables were shipped in the United States. The succeeding annual circulars show a progressive decrease, with some fluctuations, in the number of cars, and circular FCD-1920, issued January 2, 1964, shows 454,677 cars for the year 1962.

POINT 3

The rule of liability asserted by the Supreme Court of Texas in the opinion below is in accord with the bill of lading and the applicable tariff. If said bill of lading and tariff are to be interpreted as modifying the common law rule, they would be violative of the Interstate Commerce Act (49 U. S. C., Section 20(11)).

A. The bill of lading and the tariff do not affect the common law rule of liability.

The bill of lading, under which the instant shipment moved, was the Uniform Domestic Straight Bill of Lading (R. 157-167) which, since 1922, has been the form of bill of lading in general use throughout the United States. Its adoption and precise language was considered by the Interstate Commerce Commission in *The Matter of Bills of Lading*, 52 I. C. C. 671 (1919).

The brief of the Association of American Railroads (hereinafter referred to as "A. A. R.") appears to take the position that the use of this bill of lading entitles the carrier to diminish its common law liability through rules adopted in its tariff. This position is difficult to understand in view of the express language of the bill of lading in question as it relates to the context of this case:

Section 1a of the Uniform Straight Bill of Lading provides as follows:

"The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided."

The exceptions of the bill of lading thereafter provided, insofar as they relate to exemption from liability for inherent vice or defect in goods, do not in any way state or express any rule different than the common law rule. Consequently, insofar as the issues of the instant case are concerned, the express language of the bill of lading in question sets forth a liability certainly as great as that provided by the common law.

In considering and approving the very bill of lading before the court in the instant case, the Interstate Commerce Commission pointed out that the modern common law rule, as well as the old English common law, for reasons of broad public policy, rendered common carriers liable as insurers of the goods they transport, with the stated exceptions (see, *The Matter of Bills of Lading, supra*, at p. 679). The commission reviewed this bill of lading in the context of that rule of liability and expressly acknowledged that it was to be utilized for the transportation of perishable products, as well as all other products except livestock (see, *The Matter of Bills of Lading, supra*, at p. 740).

Petitioner has not in this court, or in any court below, relied upon or found it necessary to refer to Uniform Freight Classification No. 4, Rule 1. It appears to have been injected into this case for the first time by the A. A. R. in its *amicus* brief (A. A. R. brief, p. 15). The reference to this rule as creating support for the petitioner's position is obscure. Insofar as damage to merchandise in transit is concerned, the Uniform Domestic Straight Bill of

⁴ 4. A separate and differently worded livestock bill of lading was adopted March 15, 1922. See form in Uniform Freight Classification No. 4, p. 204.

Lading provides for full "common law" liability. Consequently, if it were of significance to pay an additional freight rate in order to secure full common law liability in respect to some other aspect of carrier responsibility, the argument of *amicus* might be relevant. In the instant case, however, it serves only to confuse.

Both this court and many other courts, in defining the carrier's liability as one independent of fault, and with exoneration only through establishing that damage falls within one of the recognized exceptions, have declared such rule in the context of the very bill of lading which the A. A. R. now argues provides some lesser liability (see, e.g., *Galveston Wharf Co. v. Galveston, Harrisburg & San Antonio Ry. Co.*, 285 U. S. 127 (1932); *Commodity Credit Corp. v. Nor-ton*, 167 F. 2d 161 (3rd Cir. 1948)).

The contention of the petitioner that it is entitled to exoneration, despite the fact that it failed to establish any recognized exception to liability, rests primarily on its interpretation of Rules 130 and 135 of the Perishable Protective Tariff No. 17. However, it was not the intention of the carriers in promulgating these rules, nor was it the intention of the Interstate Commerce Commission in approving them, to modify or reduce the common law liability of carriers, and these rules, by their express terms, do not make any such change or limitation.

Rule 130, in stating that a carrier does not "undertake to overcome the inherent tendency of perishable goods to deteriorate or decay", is merely restating, in different verbiage, the common law rule that a carrier shall not be held liable for damage which solely results from an inherent defect or vice in the goods. Rule 135, in stating that the carrier shall not be "liable for any loss or damage

that may occur because of the acts of the shipper or because the directions of the shipper were incomplete, inadequate, or ill-conceived", is merely reiterating the common law and bill of lading rule that the carrier shall not be liable for the "act or default of the shipper or owner". Neither of these rules refers to the presumptions, or burdens of proof involved in an action against a common carrier for damage to the commodity it transports. To conclude that these rules establish a principle of exoneration differing from the rules applicable to the transportation of all other commodities would do violence to the whole fabric of carrier law.

The Interstate Commerce Commission, in considering Rules 130 and 135 in *Perishable Freight Investigation*, 56 I. C. C. 449, feared that these, as well as other tariff rules, might be utilized in the very manner in which petitioner now seeks to limit its liability and to convey the impression that what was sought was an alteration of the fundamental rule of carrier liability. Thus the Commission stated that this type of rule was generally objectionable and that "nothing can be added to or subtracted from the law by limitations or definitions stated in tariffs" (p. 482). However, the Commission concluded that if the shipper directs in some measure the extent or character of the services furnished by the carrier, and damage results which was caused by his direction, it would be desirable to contain some notice of warning to the shipper to this effect in the Perishable Protective Tariff (pp. 482, 483). Consequently, a reworded version of the proposed Rule 130 was included in the tariff, only for that purpose, and the Commission further prescribed Rule 135.

It is of particular significance to point out that when adopting Rules 130 and 135, the carriers also sought to include in the Perishable Protective Tariff a provision to be known as Item 20(d), reading:

"Nothing in this tariff shall be construed as relieving carriers from such liability as may rest upon them for loss or damage when the same is the result of carrier's negligence." (p. 481)

Finding such a clause objectionable in the tariff relating to perishables, the Commission stated:

"Item 20(d), above quoted, is objectionable because *a carrier may be liable under common law for loss or damage which is not the result of its negligence and this item implies that there may be something in the tariff which seeks to limit such liability.*" (p. 483) (emphasis ours)

In summary, therefore, it would appear that the petitioner is urging a construction of the rules which the Commission itself, in its investigation of the transportation of perishables, expressly and emphatically rejected.

The interpretation of Rules 130 and 135 by the Circuit Court of Appeals in *Larry's Sandwiches, Inc. v. Pacific Electric Railway Co.*, 318 F. 2d 690 (9th Cir. 1963), relied upon by petitioner, appears to have been made without any consideration of the determination of the Interstate Commerce Commission in *Perishable Freight Investigation*, 56 I. C. C. 449 (1920). The conclusion of that court that the "provisions of the Carmack Amendment codifying the common law are given force through the Perishable Protective Tariff", is diametrically contrary to the treatment of such provisions by the Interstate Commerce Commission, whose approval of such tariff is, of course, based upon its under-

standing of the proposed tariff's purpose and meaning. A federal statute cannot be "given force" through the tariff of a carrier, nor can such tariff either add to, alter or dilute the common law.

The conclusion of the court in *Larry's Sandwiches* that a carrier of perishable goods need only prove its own compliance with the rules of the tariff and the shipper's instructions is not supported by the authorities therein cited.⁵ Its citation of *Chesapeake & Ohio Ry. Co. v. Thompson Mfg. Co.*, 270 U. S. 416 (1926) (which states a diametrically opposed rule of carrier liability) indicates a misunderstanding of that case and apparently accounts for its erroneous decision. The plaintiff in the *Larry's Sandwiches* case did not request this Court to grant certiorari⁶ and the oppor-

5. It is of interest to point out that the United States Court of Appeals, 9th Circuit, in an earlier decision (*The Daido Line v. Thos. B. Gonzales Corp.*, 299 F. 2d 669 (1962)) stated that a carrier was liable for damage to perishable cargo if it could not establish or explain the cause of the deterioration of the goods in its care. The court said:

"The shipper is obliged to establish that the garlic was in good condition to make its *prima facie* case, but the carrier is burdened with proving that the garlic suffered from an inherent defect in order to bring itself within the statutory exception from liability" (p. 671). * * * "There was testimony that garlic is inherently perishable and that these defects might in some measure accelerate the natural deterioration through age. But there was also testimony that all garlic was subject to these deficiencies in some degree and that properly cared for, this cargo would have survived the trip. A higher standard of proof than this would exclude all ordinarily perishable cargo from the rule imposing liability on the carrier for unexplained deterioration of goods in its care" (p. 674).

6. "No matter how important it might be to various groups to take an appeal, it is within the power of particular parties to compromise after a doubtful decision, without regard to the effect on numerous persons who are not represented. The situation is as if a corporate reorganization could be managed in court with only two parties, while all other parties were allowed to contest the same matter

tunity of calling the matter to this Court's attention arises from the granting of certiorari in the instant case.

B. Section 20(11) of the Interstate Commerce Act (49 U. S. C.) prohibits a carrier from impairing its common law liability by "contract, receipt, rule, regulation or other limitation of any character whatsoever."

The interpretation of Rules 130 and 135 of Perishable Protective Tariff No. 17 contended by the petitioner, would violate the public policy of the United States as reflected in section 20(11) of the Interstate Commerce Act. This Act provides that a carrier shall be liable for the "full actual loss, damage or injury to property caused by it" and that such liability may not be limited by contract or tariff.⁷ The petitioner's interpretation of Rules 130 and 135 would constitute a limitation by tariff of that statutory obligation.

Section 20(11) of the Interstate Commerce Act (49 U. S. C.) has been uniformly construed as codifying and imposing on the carrier its common law liability.

Secretary of Agriculture v. U. S., 350 U. S. 162, 165-166, 173 (1956);

Cincinnati, N. O. & Texas Pacific Ry. Co. v. Rankin, 241 U. S. 319, 325, 326 (1916);

N. Y., Phila. and Norfolk R. Co. v. Peninsula Produce Exchange of Maryland, 240 U. S. 34, 38 (1916);

in any other court where the property of the corporation might be found." (Trial by Combat and The New Deal, Thurman W. Arnold, 47 Harvard Law Review (1934), at p. 939.)

7. The authorities cited by the A. A. R., at p. 12 of its brief, in support of the argument that a carrier may limit its liability by contract, all preceded the adoption of the Carmack Amendment to the Interstate Commerce Act (Section 20(11)), and are, therefore, of no application.

Commodity Credit Corp. v. Norton, 167 F. 2d 161, 164 (3rd Cir. 1948);
Lehigh Valley v. John Lysaght Ltd., 271 Fed. 906, 910 (2nd Cir. 1921), cert. den. 256 U. S. 704 (1921);
Jos. Toker Co. v. Lehigh Valley R. Co., 12 N. J. 608, 97 A. 2d 598, 602 (1953);
Bird v. Palmer, 69 R. I. 388, 33 A. 2d 415 (1943)

The Circuit Court of Appeals in *Commodity Credit Corp. v. Norton*, *supra*, states:

"The suggestion of the defendant that the phrase 'caused by it' as used in the Carmack Amendment changed the common law doctrine of the liability of the common carrier was refuted in *Cincinnati N. O. & T. P. R. Co. v. Rankin*, 1916, 241 U. S. 319, 326, 36 S. Ct. 555, 60 L. Ed. 1022, L. R. A. 1917A, 265" (n. 4, p. 164).

Mr. Justice Frankfurter, in his concurring opinion in *Secretary of Agriculture v. U. S.*, *supra*, said:

"The legal import of that amendment is to bar the Interstate Commerce Commission from legalizing tariffs limiting the common law liability of a carrier for such damage. The common law, in imposing liability, dispenses with proof by a shipper of a carrier's negligence in causing the damage" (p. 173).

Section 20(11) of the Interstate Commerce Act has been amended by Congress on a number of occasions since its original passage.⁸ These amendments were adopted with full knowledge of the judicial interpretations of that Act imposing common law liability for damage to goods car-

8. See discussion of Interstate Commerce Commission in *The Matter of Bills of Lading*, 52 I. C. C. 671, at pp. 682-685.

ried in interstate commerce. What Congress has refused to do, the carrier may not accomplish by the rules of its tariff. Rules 130 and 135, if construed to permit the carrier to exonerate itself without establishing one of the common law exceptions to its insurer liability, would violate that Act.

POINT 4

Proof of the nature of the damage to a perishable does not establish the defense of inherent vice. The carrier is required to establish that an inherent defect or vice in the perishable caused the damage.

The A. A. R., in its *amicus* brief (p. 22), asserts that a *prima facie* case of inherent vice is established upon proof of the "perishability" of a commodity, and upon proof that the damage was in the nature of deterioration or decay.⁹ If this argument had validity, a complete answer would be the jury's express finding that, in fact, the damage was not caused by inherent vice (R. 178, Special Issue 6). The point, therefore, is meaningless in the context of the jury's finding.

In any event, however, this argument is based upon a wholly inaccurate premise. The A. A. R. argues (p. 26), that "the shipping contract in the instant case, with respect to a perishable commodity, contains an exception from liability of injury or damage of a certain nature, namely, deterioration or decay". This is simply not the

9. The principal damage here involved was discoloration (R. 173). It is unclear how this damage qualifies as "deterioration" or "spoilage" as distinguished from other types of damage which, it is conceded, would not be subject to the rule of liability or proof contended for by the petitioner and the A. A. R.

case. The bill of lading exception is for damage occasioned by "inherent vice", not from "deterioration or decay". "Inherent vice" is a cause, and "deterioration or decay" is an effect. They cannot be equated. Thus, as this Court stated in *Schnell v. The Vallescura*, 293 U. S. 296 (1934), at pp. 305-306, "the decay of a perishable cargo is not a cause; it is an effect. It may be the result of a number of causes for some of which, such as the inherent defects of the cargo . . . the carrier is not liable. For others . . . he is liable."

Inherent vice, by definition, is an infirmity in the goods which must inevitably cause the particular damage during the contemplated period of transportation. Decay or deterioration might occur from inherent vice, but it also might occur from many other causes for which no exemption is provided. Consequently, if a carrier could establish an exception to its liability by proving, not the cause of the damaged condition, but rather the nature of the damage, the fundamental concept of carrier liability, and the order, and burden of proof, would be destroyed.

The authorities cited by A. A. R. do not support its argument. In each of the cases cited, as distinguished from the instant case, the exception was for the nature of a particular damage, as distinct from an exception covering specific causes of damage. Since neither under the contract of carriage herein involved, nor under *Sec. 20 (11)* of the *Interstate Commerce Act* is the carrier permitted an exemption for the nature of the damage (sometimes called an effect or result), but rather must establish a cause for which exemption is provided, these cases have no application. It is also of significance to point out that the authorities in question preceded the decision of this Court in

Schnell v. The Vallescura, *supra*, and are inconsistent with the determination of this Court in that case. It is of further significance to point out that the authorities relied upon by the A. A. R. reiterate the very proposition which the petitioner now seeks to deny. They hold that the carrier must establish any permissible exception to its liability and may not exonerate itself by attempting to prove freedom from negligence (e.g., *The Folmina*, 212 U. S. 354 (1909)).

The petitioner (p. 19) takes a slightly different tack in arguing that proof of perishability and decay establishes inherent vice.¹⁰ It asserts that under the authority of *F. O. Bradley & Sons Ltd. v. Federal Steam Navigation Co., Ltd.*, 137 Law Times Rep. 266 (1927) the perishability of a product establishes "inherent vice". That decision is both inadequately quoted and its conclusions taken out of context. Read in its unemasculated version, it was a finding of the court, upon conflicting evidence, that the apples which were damaged "were simply weaker than their neighbors or had some idiosyncrasy . . . such, that they could not stand the voyage. They decayed, not because of the ship, or of the sea, or of the route, but because they were apples which were not fit to make the voyage in an ordinary way." The court found the infirmity of the de-

10. The petitioner, in its brief (pp. 19-20), seems to indicate that the Secretary of Agriculture, in its brief to this Court in *Secretary of Agriculture v. United States*, 350 U. S. 162 (1956), as well as the statement of this Court in that case at p. 165, n. 9, is in agreement with its position. The contrary, however, is the fact. Even a cursory reading of the Secretary's brief, as well as the note in question, would indicate that the rule of carrier liability urged by the Secretary, and conceded by the carrier, was the traditional common law rule that exoneratation can only follow proof by the carrier that damage to goods was solely occasioned by one of the recognized exceptions.

cayed apples to fall within the defense "resulting from inherent quality or vice" (p. 54a writ). The citation of this case as authority in a case where the opposite findings were made by the jury (Special Issues Nos. 1, 2 & 6, R. 176, 178), is of dubious value.

POINT 5

There is no basis in sound public policy to provide a different rule of carrier liability in respect to the carriage of perishables in contrast to the transportation of other commodities.

The general rule of carrier liability is based upon the significant premise that the carrier, in the discharge of his obligation and duty imposed upon him by law and the contract of carriage, has peculiarly within his knowledge "all of the facts and circumstances upon which he may rely to relieve him of that duty. In consequence, the law casts upon him the burden of the loss which he cannot explain, or explaining, bring within the exceptional case in which he is relieved from liability" (*Schnell v. The Vallescura*, 293 U. S. 296, 304 (1934)). "It is founded on a great principle of public policy; has been approved by many generations of wise men; and if the courts were now at liberty to make, instead of declaring, the law, it may well be questioned whether they could devise a system which on the whole would operate more beneficially" (4 R. C. L., sec. 176). As stated by the Interstate Commerce Commission in *The Matter of Bills of Lading*, 52 I. C. C. 671 (1919), at p. 679:

"In the celebrated case of *Coggs v. Bernard*, 2 Lord Raymond, 909; 1 Smith's Leading Cases, 369, Lord Holt, in quaint language, states the common-law liability of carriers as of that time to be that if 'a delivery to carry or otherwise manage, * * * is made 'to one that exercises a public employment, * * * and he is to have a reward, he is bound to answer for the goods at all events. * * * The law charges this person thus intrusted to carry goods, against all events, but acts of God, and of the enemies of the King. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, &c., and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point.' "

The public policy upon which carrier insurer liability is based, is as necessary for protection of the public in the carriage of perishables as in the carriage of other products, and the freight rates of the carrier in the carriage of perishables reflect this liability. As stated by the New York Court of Appeals in *Tierney v. New York Central & H. R. R. R. Co.*, 76 N. Y. 305, 315 (1879):

"Doubtless the defendant, as was lawful, measured the compensation it should receive in part by the hazard it incurred and the extra care and diligence imposed upon it by the fact that the articles were perishable. The obligation would not have been other or different

had there been an express agreement. Of the carrier, Lord Coke says: 'He hath his hire and thereby impliedly undertaketh the safe delivery of the goods delivered to him,' and in *Hollister v. Nowlen* (19 Wend. 238), the court says: 'The carrier may no doubt demand a reward proportioned to the services and the risk he incurs, and having taken it he is treated as an insurer and bound to the safe delivery of the property. But the extent of his liability does not depend on the terms of his contract. It is declared by law.' Again: 'It is not the form of the compact but the policy of the law which determines the extent of the carrier's liability'."

The petitioner asserts that the philosophy reflected in *Coggs v. Bernard*, quoted in *The Matter of Bills of Lading, supra*, is both old and extreme. However, as pointed out by the Commission in that case, under the common law, as it has developed, the application of the rule as enunciated in *Coggs v. Bernard* has been applied to "modern transportation conditions and practices" and "there has been little or no relaxation of the rigor of the rule of the common carrier's liability" (p. 679) (*cf.*, *Atlantic Coastline v. Riverside Mills*, 219 U. S. 186, 205, 207 (1911)).

Damage to perishables, whether it be termed spoilage, deterioration, or decay, may have many possible causes. A carrier may not have furnished appropriate refrigeration or ventilation; it may not have furnished a suitable refrigerator car;¹¹ the insulation of the refrigerator car

11. "A tabulation and descriptive statement of the insulated equipment of carriers under federal control, prepared by the Division of Operation of the United States Railroad Administration, and introduced in evidence by us; shows an utter lack of anything approaching uniformity on manner of variations in the extent and kind of insulation, in the construction of bunkers and bulkheads and in the provision

may be defective, insufficient or inefficient; decay may stem from bruising of the perishable as the result of rough handling through switching operations, violent stoppage and starting of trains, improperly maintained roadbeds, or collisions; the outside elements may have been introduced into the car through defective doors, hatchways, or other poorly insulated areas of the car supplied, or through extended stays at icing and reicing stations; fans may have been turned off by error or never turned on. In none of these areas is the shipper in a position to acquire the facts or to directly challenge the records of the carrier or its agencies.¹² Many occurrences are not reflected in a carrier's records. Failure to utilize recognized procedures in icing a bunker, or failure to manipulate a vent, or a jarring of moderate force may never find itself reported in any record whatsoever. Thus, even a jury finding that the carrier was free from negligence does not exclude the possibility that damage was occasioned through fault of the carrier in some area which was not brought to the attention of the jury because of the unequal position of the parties in dealing with the facts. If the carrier's burden of proof, therefore, is limited to establishing freedom from

of floor racks. There can be little doubt but that many of these cars, judged by reasonable modern practice, cannot be operated with efficiency or economy" (*Perishable Freight Investigation*, 56 I. C. C. 449, 488-489 (1920)).

12. "All the consignee usually has the means of knowing is that the goods have been lost or have turned up damaged. Clearly the carrier and not the shipper is the one in the position to know, and would be able to prove most facts concerning events on the voyage. The allocation of burden of proof may make more difference than the nature of the substantive rules in the actual outcome of litigation and in the negotiating position in regard to claims settlement" (*Gilmore & Black, The Law of Admiralty*, p. 121).

negligence, rather than establishing the cause of the damage as falling within one of the exceptions, the shipper would be at the mercy of the carrier's records, or lack thereof, and the required care and fidelity of a carrier would thereby be diluted.

The carrier is generally as knowledgeable as the shipper concerning the condition of the perishable at the time of receipt by the carrier. The carrier's agents are at every shipping point; the fruits and vegetables normally move from well-defined growing areas during particular growing periods and to well-defined market areas where the carriers maintain trained inspection personnel. Weather data is available both from government sources and carrier's agents at shipping area.

Any burden of proof placed upon the shipper, based upon his knowledge of the facts, is discharged by the requirement that the shipper must establish the good order and condition of the commodity when delivered to the carrier for transportation as part of its *prima facie* case. To argue further that the carrier should be excused from establishing the affirmative defense of "inherent vice" is not only to overlook the carrier's knowledge concerning the condition of the shipment, but to disregard the more significant factor of the relationship between proof of the existence, or lack, of inherent vice and the events of transportation.

The argument of petitioner and the A. A. R. seems to suggest that a perishable product is distinctive and, therefore, calls for a special rule of carrier liability. However, all products are more or less perishable and the term "perishable", as applied to any product, is, in the end, a matter of degree. Things are perishable only in the con-

text of time and environment; even rock is perishable, else we would lack the very soil of the earth.¹³

The unspoiled freshness and high quality and the profusion and variety of perishable products available daily, throughout the year, is evidence that their safe transit is readily accomplished. No witness in the case below suggested that honeydew melons cannot be, and are not, regularly and safely transported from Texas to Chicago, or to more distant points. The petitioner's generalization, therefore, of the "notorious fact . . . that all fruits and vegetables will ultimately decay" is without significance to the issues presented by this case.

Many products of farm and orchard are staples of recognized hardiness that survive weeks and months of storage and transportation, some without any refrigeration, while others are of lesser durability. The banana, a tropical fruit, shares the markets throughout this country and the western world with countless varieties of fruits and vegetables. Citrus from California, Florida, and Texas, and apples and pears from Virginia, the Northwest, and the Northeast share the world and the domestic market with those of Chile, Argentina, Australia, New Zealand and elsewhere.¹⁴

13. "soil . . . disintegrated rock" etc. (Webster's Third International Dictionary)

14. *Modern Ship Stowage*, a publication of the United States Department of Commerce, Bureau of Foreign and Domestic Commerce (1942), states:

"FRESH FRUIT CARRIED UNDER VENTILATION"

Great quantities of fresh or 'green' fruits are carried today by refrigerated vessels, but there is still a considerable amount of fruit carried from certain regions in uninsulated vessels, many of

The rule that petitioner is apparently contending for is one of the broadest implication.¹⁵ If we understand its reasoning, all a railroad need do is label an article as "perishable" or establish that it will "ultimately decay", and the defense of inherent vice is established. (The petitioner

which were specially designed for this trade, or in ordinary cargo vessels. Apples are carried from Canada and the United States without refrigeration, and other cargoes include oranges, lemons, grapes, etc., from numerous Mediterranean ports and from the Canary Islands and other North Atlantic islands. These shipments probably comprise most of the fruit shipped in uninsulated vessels, although there are occasional shipments from the West Indies and a few other regions (p. 246).

* * *

Much fresh fruit is carried without refrigeration on short voyages such as those from Spain, Palestine, and the Canary Islands to the United Kingdom, or, in the case of some fruit such as apples, from the east coast of the United States to Europe. On the longer routes, however, such as those from the United States Pacific coast, New Zealand, Australia, Tasmania, and South Africa to the United Kingdom, and from the east and west coasts of South America to the United States and Europe, most fresh fruits can be carried satisfactorily only under refrigeration." (p. 306).

15. The reach of this argument may be surmised from the range of "perishables" included in Perishable Protective Tariff 17. Item 25880 (pp. 525-526) defines "perishable freight" as follows:

"Perishable Freight is any Commodity which is Susceptible to Deterioration or Decay, and/or Which May Be Protected by Refrigeration, Icing, Ventilation or Against Cold, including:"

(The reference to "any" commodity which is "susceptible to deterioration" would appear to greatly broaden the item.) There follows in the definition a listing of over 150 items and categories of items, commencing with Acetic Acid, Glacial; Ale (except Ginger); Asphalt Emulsion; and ranging through Battery Separators, Candles, Canned Goods, edible; Confectionery, Fruits, canned; Grease, edible; Ink, liquid (except printer's ink); Mucilage, Oils, edible, in packages; Paper, building or wrapping, waxed and/or asphalted; Shellac, dry ground; Vegetables, canned; Vinegar, Water, Wine, etc.

does not appear to be disturbed by the incongruity of deeming the defense established in a case where the jury has found that it was not.) The indiscriminating character of this position is that, regardless of the distance, or duration of the journey, and regardless of the hardness or lack of hardness of the commodity, the carrier's liability is automatically reduced to that of an ordinary bailee and the shipper is deprived of his rights under the bill of lading. The distinction which the petitioner wishes to make, because of the wide range of products to which it would apply if adopted, would, in effect, destroy the common law rule of carrier liability, to the disruption and disadvantage of the shipping public of the United States.

The A. A. R. asserts (brief, p. 3) that in the year 1962 carriers paid over eight million dollars in loss or damage claims arising from the carriage of fresh fruits and vegetables.¹⁶ If this is a high volume of claims, it is also a high volume of fault, and the amount of claim payments therefore, which stem from conceded fault on the part of the carrier, can hardly afford an argument that its obligations or burdens should be reduced. As a matter of fact, the amount of loss and damage claims paid by carriers for fresh fruits and vegetables are neither significantly different nor greater than loss or damage claims paid in the

16. The circular of the A. A. R., No. FCD 1897, referred to by the petitioner, indicates that these payments were divided by it into 11 categories entitled: (1) "Loss Entire Package", (2) "Loss Other Than Entire Package", (3) "Improper Handling—All Damage Not Otherwise Provided For", (4) "Defective or Unfit Equipment", (5) "Temperature Failures", (6) "Delay", (7) "Theft", (8) "Concealed Damage", (9) "Train Accident", (10) "Fire, Marine and Catastrophes", and (11) "Error of Employees".

shipment of many other so-called non-perishable products. In many instances they are less.¹⁷

The purported distinction between perishable products and other commodities is not a real one, and the public policy upon which the common law rule of carrier liability is based, is as urgently required for the protection of the shipping public in relation to the carriage of "perishables" as to any other type of commodity.

Conclusion

It is respectfully submitted that the decision of the Supreme Court of Texas should be affirmed.

Respectfully submitted,

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17. For example, in the year 1960, as reported by circular No. FCD 1816 of the A. A. R., the loss and damage claims paid by American carriers, per one hundred dollars of revenue, for stoves and ranges was \$8.02, for sewer pipes and drain tile \$18.47, for furnaces and radiators \$6.77, and for plumbers' goods \$7.97. In comparison, the amount of loss and damage claims, per one hundred dollars of revenue, for citrus was \$1.93, for fresh vegetables \$3.39, for frozen foods \$1.06, for meat \$1.77, for fresh fruits other than citrus \$3.45 and for bananas \$2.94. Thus, there would appear to be no particular relationship between so-called perishability of products and the amount of loss and damage claims paid by carriers.

Certificate of Service

I hereby certify that the foregoing brief has this day been served on each party to this case by mailing copies thereof to the respective counsel of record at their post office addresses, first-class mail, postage prepaid.

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February 11, 1964

Description of Amici Curiae

(1) **UNITED FRESH FRUIT & VEGETABLE ASSOCIATION** is a national organization of more than 3,500 members, consisting of shippers, growers, wholesalers, terminal market operators, brokers, retailers, and members of allied industries. About 35% of the members are shippers; 50% wholesale distributors and suppliers; and 15% brokers, and others. Its members handle, at some point in the marketing process, about 75% of the total commercial fresh fruit and vegetable marketings in the United States. The Association has been in existence since 1903. From its inception, it has maintained an interest in the transportation problems of its membership. Its principal office is at 717-14th Street, N. W., Washington, D. C.

(2) **TEXAS CITRUS & VEGETABLE GROWERS & SHIPPERS** is a statewide organization, organized in 1942, with headquarters at 306 E. Jackson, Harlingen, Texas. The membership includes 122 shippers in interstate commerce of fresh fruits and vegetables and, in addition, approximately 150 growers and suppliers of equipment, services and supplies to the shipper members. A major interest of the organization includes matters, issues and policies involving transportation.

(3) **CALIFORNIA GRAPE & TREE FRUIT LEAGUE** is an association whose membership includes 211 growers and shippers of fresh deciduous tree fruits, berries and grapes. The membership represents more than 85% of these commodities that are shipped from California annually (approximately 30,000 carloads). A major concern of the organization is the transportation problems of its members. Its offices are at 717 Market Street, San Francisco 3, California.

Appendix

(4) NORTHWEST HORTICULTURAL COUNCIL, through its members, represents the growers, packers and shippers of practically all apples produced in the States of Washington and Oregon, and more than 90% of the other deciduous fruits. This includes more than 150 firms who pack and ship fruit, and approximately 9,000 growers. Its offices are at 1002 Larson Street, Yakima, Washington.

(5) FLORIDA FRUIT & VEGETABLE ASSOCIATION is a non-profit agricultural trade association representing growers and shippers of fresh fruits and vegetables in and from Florida. It is the major interest of its kind in the state and represents the principal growers and shippers of fruits and vegetables within Florida. A chief objective of the organization is promoting the economical development and stability of the Florida fruit and vegetable industry, and the maintenance of lawful and sound principles affecting the transportation of the products of its members. Its office is at 4401 East Colonial Drive, Orlando, Florida.

(6) INTERNATIONAL APPLE ASSOCIATION, INC. is a non-profit membership organization incorporated under the laws of the District of Columbia. It was organized in Chicago in 1895. Its offices are at 1302—18th Street, N. W., Washington, D. C. It has about 1,300 members, representing various segments of the fruit industry throughout the country. About 20% of its members are located outside of the United States. About 45% of its members are directly connected with the fruit industry as growers and shippers, and about 30% in distribution. It is the oldest trade association in the fruit and vegetable industry and has, from

Appendix

its inception, been active in transportation problems of its members.

(7) **WESTERN GROWERS ASSOCIATION**, with offices at 3091 Wilshire Boulevard, Los Angeles, California, was formed in 1926. It is comprised of 510 members, including 275 growers and shippers of vegetables and melons located in the States of California and Arizona. California and Arizona produce in excess of 40% of the national total of vegetables and melons, and ship in fresh form to the nation's markets annually in excess of 300,000 carloads/trucklots of these products.

(8) **GROWERS AND SHIPPERS LEAGUE OF FLORIDA** is an organization of growers and shippers of citrus fruits and vegetables in Florida. It is the duly authorized transportation agent of the Florida Citrus Commission and of the Florida Cannery Association, and authorized representative for the Florida Citrus Mutual, a non-profit organization of growers and shippers of citrus fruits in and from Florida. Its concern in the instant litigation is with the establishment of proper principles of liability in the transportation of the products of its membership, which move throughout the country and abroad. Its office is at 45 West Central Boulevard, Orlando, Florida.

(9) **SOCIETY OF AMERICAN FLORISTS AND ORNAMENTAL HORTICULTURISTS** has its offices at the Sheraton Park Hotel, Washington, D. C. It is a national trade association of floriculture, representing growers, wholesalers, retailers and allied tradesmen. It is a federated-type association, representing 200 allied floral associates. The Society was organized in 1884 and chartered by Act of Congress in 1901.

Appendix

It has 4,500 direct members and performs the usual duties, responsibilities and programs of a national trade association. The growing and producing areas are, for the most part, in remote locations throughout the United States; necessitating widespread use of air, rail and truck transport in the distribution of the industry's products. The Society is vitally interested in matters adversely affecting the transportation rights of its members.

(10) NATIONAL FISHERIES INSTITUTE, INC. is a national trade organization representing all segments of the fishing industry of the United States, and is composed of 500 members. Its principal offices are at 1614—20th Street, N. W., Washington, D. C. The objectives of the Institute are to promote the development, operation and merchandising of fish and seafood products, and to appear before Congressional committees and executive and administrative bodies of the government in order to obtain the enactment of sound laws, rules and regulations. The litigation before the court is of vital interest to this industry because of the substantial interest of the industry in problems affecting public transportation.

(11) EASTERN FREEZERS ASSOCIATION is an organization of frozen food packers situated principally on the eastern seaboard, and extending into Texas and Michigan. Among its objectives are the fostering and promotion of economical and efficient development of the industry, and the advancement of the common interests of its members through improved quality of production and efficient and safe distribution of their products. As these products are produced and shipped throughout the United States, they are vitally interested in this litigation.

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Supreme Court of the United States

OCTOBER TERM, 1963

No. 292

MISSOURI PACIFIC RAILROAD COMPANY, *Petitioner*

v.

ELMORE & STAHL, *Respondent*.

On Writ of Certiorari to the Supreme Court of Texas

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February 1964

INDEX

	Page
I. Since the Carrier has Shown its Freedom from Negligence and Compliance with the Shipper's Instructions, it is not Liable for the Spoilage and Decay of the Melons	1
II. Respondent's Assertion that a Carrier Should be Absolutely Liable for the Spoilage and Decay of Perishables is Without Foundation	12
Conclusion	17

CITATIONS

CASES:

Adams Express Co. v. Croninger, 226 U.S. 491 (1913)	11
Akerly v. Railway Express Agency, Inc., 96 N.H. 396, 77 A. 2d 856 (1951)	4
Atlantic C.L. Ry. v. Georgia Packing Co., 164 F. 2d 1 (5th Cir. 1947)	12
California Packing Corp. v. The Empire State, 180 F. Supp. 19 (N.D. Cal. 1960)	3
Chesapeake & O. Ry. v. Timberlake, Currie & Co., 147 Va. 304, 137 S.E. 507 (1927)	3
Chesapeake & O. Ry. v. W. C. Crenshaw & Co., 147 Va. 290, 137 S.E. 515 (1927)	3
Chicago & E.I.R.R. v. Collins Produce Co., 249 U.S. 186 (1919)	3
Chicago & N.W. Ry. v. Whitnack Produce Co., 258 U.S. 369 (1922)	3
Commercial Molasses Corp. v. New York Tank Barge Corp., 314 U.S. 104 (1941)	3
Commodity Credit Corp. v. Norton, 167 F. 2d 161 (3d Cir. 1948)	3
Compania De Vapores Inseo v. Missouri Pacific R.R., 232 F. 2d 657 (5th Cir. 1956)	3
F.O. Bradley & Sons Ltd. v. Federal Steam Navigation Co. Ltd., 137 Law Times Rep. 266 (H.L. 1927)	7, 15
Larry's Sandwiches, Inc. v. Pacific Elec. Ry., 318 F. 2d 690 (9th Cir. 1963)	2

	Page
Lehigh Valley R.R. v. Russia, 21 F. 2d 396 (2d Cir. 1927)	3
Louisiana S. Ry. v. Anderson, Clayton & Co., 191 F. 2d 784 (5th Cir. 1951)	3
Mirski v. Chesapeake & O. Ry., 15 CCH Fed. Carriers Cas., para. 81,591 (December 13, 1963)	4
Missouri, K. & T. Ry. v. Harriman Bros., 227 U.S. 657 (1913)	11
N. H. Nelson & Co. v. Chicago & N.W.Ry., 102 Neb. 439, 167 N.W. 574 (1918)	3
Perishable Freight Investigation, 56 I.C.C. 449 (1920)	8, 14
Perkel v. Pennsylvania R.R., 148 Misc. 284, 265 N.Y.S. 597 (1933)	3
Power Reactor Development Co. v. International Union, 367 U.S. 396 (1961)	10
Reider v. Thompson, 116 F. Supp. 279 (E.D. La. 1953)	3
Schnell v. The Vallescura, 293 U.S. 296 (1934)	4, 6
Secretary of Agriculture v. United States, 350 U.S. 162 (1956)	3, 11
Southern Pacific Co. v. Itule, 51 Ariz. 25, 74 P. 2d 38 (1937)	2
Southern Ry. v. Bateman Fruit Exchange, 173 Ga. 826, 162 S.E. 112 (1931)	4
Stuart v. Laird, 1 Cranch 299 (1803)	10
The Folmina, 212 U.S. 354 (1909)	6
Trautmann Bros. Co. v. Missouri Pac. R.R., 312 F. 2d 102 (5th Cir. 1962)	5, 6, 7, 11, 12
Unemployment Comm'n v. Aragon, 329 U.S. 143 (1946)	10
United States v. Midwest Oil Co., 236 U.S. 459 (1915)	10
United States v. Mississippi Valley Barge Line Co., 285 F. 2d 381 (8th Cir. 1960)	3

STATUTES AND REGULATIONS:

Perishable Protective Tariff No. 17	
Rule 130	8
Rule 135	8
38 Stat. 1196 (1915)	11
39 Stat. 441 (1916)	11

IN THE
Supreme Court of the United States
OCTOBER TERM, 1963

No. 292

MISSOURI PACIFIC RAILROAD COMPANY, *Petitioner*,

v.

ELMORE & STAHL, *Respondent*.

On Writ of Certiorari to the Supreme Court of Texas

REPLY BRIEF FOR THE PETITIONER

I. SINCE THE CARRIER HAS SHOWN ITS FREEDOM FROM NEGLIGENCE AND COMPLIANCE WITH THE SHIPPER'S INSTRUCTIONS, IT IS NOT LIABLE FOR THE SPOILAGE AND DECAY OF THE MELONS

A common carrier by rail is not liable for spoilage and decay of an interstate shipment of perishable commodities, when it sustains the burden of showing that it

has exercised due care as to the shipment and has complied with the instructions of the shipper. This is true on three alternative bases, each one of which would suffice to support this result: (1) the Bill of Lading's reference to liability "as at common law"; (2) the Bill's exception for damage resulting from inherent vice; and (3) the express provisions of the Perishable Protective Tariff, incorporated by the Bill.

Respondent's Brief does not refute any one of these three alternative bases.

1. *In the absence of negligence, the carrier is not liable for spoilage of perishables under the common law as applied under the Bill of Lading.*—(a) We have cited numerous cases (Pet. Br. 12-14) in support of the proposition that, at common law, a carrier who has demonstrated his freedom from fault and compliance with the shipper's instructions is not liable for a spoilage or decay claim with respect to perishables. The leading state court case dealing with an interstate shipment is *Southern Pacific Co. v. Itule*, 51 Ariz. 25, 74 P.2d 38 (1937); and a representative Federal Court decision is the very recent Ninth Circuit case of *Larry's Sandwiches, Inc. v. Pacific Elec. Ry.*, 318 F.2d 690 (9th Cir. 1963). Respondent admits that these cases are contrary to its position; and despite the laborious distinctions essayed by respondent, the other cases we have cited all support this basic proposition.

This proposition cannot be refuted—as respondent would—by pointing to general statements about "absolute" or "insurer's" liability in cases not involving claims for spoilage to perishables and not discussing

the principles relevant to them.¹ We stand on our original statement (Pet. Br. 15) that we have found no holding, apart from that of the courts below, con-

¹ Respondent—and the amici Shippers' Associations—frequently describe their cited cases as having to do with fruits and vegetables, while omitting the fact that they are not cases of spoilage or decay. For example, respondent (Res. Br. 10) says that the "insurer rule" has been applied to "onions, to apples, molasses, and most recently, eggs" and that it has been applied "to a shipment of live poultry." But none of the cases cited is a natural deterioration case. The cited cases are (Res. Br. 10): *Commercial Molasses Corp. v. New York Tank Barge Corp.*, 314 U.S. 104 (1941) (loss of molasses aboard barge which sank); *Chicago & N.W.Ry. v. Whittack Produce Co.*, 258 U.S. 369 (1922) (apples which froze in transit); *Secretary of Agriculture v. United States*, 350 U.S. 162 (1956) (breakage of eggs); *Chicago & E.I.R.R. v. Collins Produce Co.*, 249 U.S. 186 (1919) (commandeering of live poultry to alleviate famine). Occasionally, cases dealing with breakage or damage to packaging, or cases dealing with improper packaging, are cited by respondent or the Shippers' Associations as if they were spoilage cases. See *Perkel v. Pennsylvania R.R.*, 148 Misc. 284, 265 N.Y.S. 597 (1933) (S.A. Br. 12-13); *Commodity Credit Corp. v. Norton*, 167 F.2d 161 (3d Cir. 1948); *California Packing Corp. v. The Empire State*, 180 F. Supp. 19 (N.D. Cal. 1960) (Res. Br. 10).

Still other cases cited by respondent or the Shippers' Associations are decisions which accept, or apparently accept, the rule which we contend for, but in which the carrier was not found free from negligence, and accordingly was held liable, see *N. H. Nelson & Co. v. Chicago & N.W.Ry.*, 102 Neb. 439, 167 N.W. 574 (1918); *Chesapeake & O. Ry. v. Timberlake, Currie & Co.*, 147 Va. 304, 137 S.E. 507 (1927); *Chesapeake & O. Ry. v. W. C. Crenshaw & Co.*, 147 Va. 290, 137 S.E. 515 (1927) (S.A. Br. 12), or are simply cases having nothing to do with the issue, see *Compania De Vapores-Inasco v. Missouri Pacific R.R.*, 232 F.2d 657 (5th Cir. 1956) (damage to Chrysler automobile); *Lehigh Valley R.R. v. Russia*, 21 F.2d 396 (2d Cir. 1927) (sabotage to explosives); *Reider v. Thompson*, 116 F. Supp. 279 (E.D. La. 1953) (sheepskins damaged by water from outside source); *United States v. Mississippi Valley Barge Line Co.*, 285 F.2d 381 (5th Cir. 1960) (cut auto tire); *Louisiana S. Ry. v. Anderson, Clayton & Co.*, 191 F.2d 784 (5th Cir. 1951) (cotton damaged by fire) (all Res. Br. 10); *Akerly v. Railway Express*

trary to the proposition that the carrier, upon proof of its freedom from negligence, and compliance with the instructions of the shipper, is exonerated at common law from liability in the case of spoilage or decay of a shipment of perishable commodities. This remarkable consensus² eloquently demonstrates the content of the common law rule, applicable under the Bill's provision that the carrier "shall be liable as at common law." (Para. 1(a), R. 158).

(b) As we demonstrated in our opening brief, this established rule as to perishables is founded in the fundamental allocation of responsibility for common carrier shipments established from the early days of common law adjudication; and courts applying the common law applied this rule as soon as long distance shipment of perishable commodities began to be usual. (Pet. Br. 11-14). This rule, then, is in every respect applicable under the Bill of Lading's reference to

Agency, Inc., 96 N.H. 396, 77 A.2d 856 (1951) (freezing of eggs, a condition which the court expressly distinguished from the application of the special rule as to perishables) (S.A. Br. 13-14). In *Southern Ry. v. Bateman Fruit Exchange*, 173 Ga. 826, 162 S.E. 112 (1931), the holding of the court is unclear from its brief "Syllabus Opinion" rendered in response to certified questions. The sentence following the material quoted by the Shippers Associations (S.A. Br. 12-13) suggests that where carrier negligence is negated, a case of "inherent vice" is made out, which accords with our position. See 162 S.E., at 113.

For *Schnell v. The Vallescura*, 293 U.S. 296 (1934), the only other case cited against our contentions as to the content of the common law, see note 5, *infra*.

² The most recent reported decision following this general principle is *Mirski v. Chesapeake & O. Ry.*, 15 CCH Fed. Carriers Cas., para. 81,591 (opinion released December 13, 1963).

liability "as at common law."³ The common law does not impose an absolute carrier liability against spoilage of perishables.

2. *This case is within the inherent vice exception in the Bill of Lading.*—The Bill of Lading provides, in terms, that absent negligence, the carrier shall not be accountable for loss or damage "resulting from a defect or vice in the property." (Para. 1(b), R. 158). The respondent insists that petitioner has not made out a case of "inherent defect or vice" in the case at bar. (Res. Br. 20-23). It is, however, difficult to ascertain what further showing respondent would exact. The respondent does not seriously suggest that this case is one other than of spoilage and decay—natural deterioration—of a perishable commodity.⁴ This is not a

³ We have never conceded otherwise—as respondent hopefully suggests (Res. Br. 9, 19)—and in fact our position has been expressly that this rule as to perishables is part of the common law. (Pet. Br. 10, 14).

⁴ Both the Texas Supreme Court (R. 243) and the Texas Court of Civil Appeals (R. 231-32) viewed the case as one of a "claim . . . for spoilage and decay" (R. 243), as to which the only issue was the proper legal rule to be applied. We do not understand the respondent to contend that the condition of "Bacterial Soft Rot, generally in advanced stages" which had infested the melons is not a matter of spoilage and decay. (R. 115) The melons, per the inspection, also showed signs of "discoloration," (R. 46) As to the suggestion made in this Court (Res. Br. 21) that the "discoloration" was not a condition of deterioration, spoilage or decay, but a condition associated with bruising, the record is clear that the inspection distinguished between "bruising" and "discoloration," the latter being associated with "decay," as a matter of "condition." (R. 73) Of course, the jury found that the carrier performed the transportation without negligence. (R. 177) The expert testimony as to the meaning of "discoloration" was that it was a surface condition of the melons that would set in on their way to destination markets where the melons had been harvested before the proper time. (R. 114)

case involving theft, fire, loss or disappearance of the shipment, breakage, or the like, which would present altogether different issues.

The point is that where the loss is one of spoilage or decay of perishables, and the carrier demonstrates its freedom from fault and compliance with the shipper's instructions—as the jury found here—there is nothing further which the carrier need show to bring itself within the “inherent vice” exception.⁵ See *Trautmann Bros. Co. v. Missouri Pac. R.R.*, 312 F.2d 102, 105 (5th Cir. 1962). It is interesting to note that the *amici* Shippers' Associations correctly admit that “the inherent tendency of perishable goods to deteriorate or decay” is an example of “inherent vice.” (S.A. Br. 17). Thus, where spoilage occurs, and the carrier shows its freedom from fault and compliance with shipper's instructions, the case is one within the “inherent vice” exception. “[W]here goods are delivered in a damaged condition, plainly caused by . . . decay, their condition brings them within an exception exempting from that character of loss, as the very fact of the nature of the injury shows the damage to be *prima facie* within the

⁵ To be sure, Justice Stone in *Schnell v. The Vallescura*, 293 U.S. 296 (1934), put the matter in slightly different verbal terms, but without any real distinction. He stated that the decay of a perishable cargo was not in itself an example of “inherent vice”—as the Shippers' Associations take pains to quote (S.A. Br. 11-12); but the rest of his opinion makes it plain that, in a spoilage case, once the carrier showed its freedom from negligence, an exception would be available. See 293 U.S., at 304, 305-06. Thus the rule in the *Schnell* case is identical with the rule as to the exception which we contend for; because, as we concede, and under the express terms of the Bill (Para. 1(b), R. 158), the inherent vice exception is only available in the absence of the carrier's negligence; and the jury here found the carrier free of negligence.

exception. . . ." *The Folmina*, 212 U.S. 354, 362 (1909).⁶ Proof of compliance with the shipper's instructions and freedom from negligence completes the required showing. "The negation of the one [negligence] establishes the other [the 'inherent vice' exception]." *F. O. Bradley & Sons Ltd. v. Federal Steam Navigation Co. Ltd.*, 137 Law Times Rep. 266 (H.L. 1927) (Pet. 53a)—The effort by respondent, and by the Shippers' Associations, to suggest that there is something else that must be shown—it is never concretely and explicitly stated what⁷—is simply an effort at obfuscation of the issues.⁸

⁶ Of course, as respondent points out (Res. Br. 20-22), where the damage involves something other than the deterioration of perishables, a case of "inherent vice" would require other proof. But spoilage of a shipment of perishables is of itself a case to which the inherent vice exception is applicable; and accordingly, the test of the carrier's liability is negligence. Certainly, if the loss were, for example, one of the breaking of machinery, the applicability of the exception could not be made out absent some special sort of proof, because it is not of the nature of machinery that it will break simply with the passage of time.

⁷ At one passage (Res. Br. 21-23), respondent suggests that it may be embracing the novel theory that this exception is limited to cases of commodities which have unusual or peculiar tendencies to spoilage or decay—such as vegetables or fruit having peculiar fungus afflictions or botanical conditions. This theory is supported by none of the decided cases, and as we demonstrated in our opening brief, the leading case of *F. O. Bradley & Sons Ltd. v. Federal Steam Navigation Co. Ltd.*, 137 Law Times Rep. 266 (H.L. 1927), rejects it, as does the decision of the Fifth Circuit in *Trautmann Bros. Co. v. Missouri Pac. R.R.*, 312 F.2d 102 (5th Cir. 1962).

⁸ The Shippers' Associations make some point of the fact that the jury failed to find that the worsened condition of the melons was due entirely to "inherent vice" (S.A. Br. 26). But the fact of the matter is that in a case of spoilage and decay, once the jury made the affirmative finding that the carrier was free from negligence and had performed the transportation services as re-

3. *The terms of the Perishable Protective Tariff confirm that the carrier is not liable for the spoilage or decay of perishables in this case.* We contend that all three of the relevant provisions in this case—the Bill's reference to the "common law", the "inherent vice" exception in the Bill, and the Perishable Protective Tariff, incorporated by the Bill—lead to the same conclusion. Nevertheless, it is clear that if even one of these provisions effectively provides that there shall be no liability for spoilage and decay of perishables, absent carrier negligence or failure to comply with instructions, the judgment below must be reversed.

Rule 130 of Perishable Protective Tariff No. 17 makes it clear that a carrier furnishing protective services (as was done here) does not "undertake to overcome the inherent tendency of perishable goods to deteriorate or decay but merely to retard such deterioration or decay insofar as may be accomplished by reasonable protective service, of the kind and extent requested by the shipper, performed without negligence." Rule 135 of the Tariff also makes it clear that: "The duty of the carrier is to furnish without negligence reasonable protective service of the kind and extent so directed or elected by the shipper . . ."

In an effort to overcome the plain meaning of these provisions, respondent suggests alternatively (1) that

requested by the shipper, the submission of this issue and the consideration of it by the jury were simply superfluous. And, as the discussion by respondent seems to confirm (Res. Br. 3), and as we demonstrated in our opening brief (Pp. 5, 20), the failure of the jury to find the affirmative on Special Issue No. 6 does not create any inconsistency with its findings that the carrier was free of negligence and complied with the shipper's instructions and the Bill of Lading (Special Issues Nos. 4 & 5, R. 177). These are the controlling findings.

the Tariff rules "merely elaborate on the exception for damage resulting from a default [sic] or vice in the property . . . and the exception for damage caused by the act or default of the shipper" (as it would construe them); or alternatively, (2) that, despite the fact that they have been in existence over forty years, the rules are void. (Res. Br. 24) This second point appears to be made for the first time in this Court.

(a) Neither branch of this argument is sustainable. Respondent's first contention only proves that the meaning of the "inherent vice" exception and the standard imposed at common law are as we contend they are. For the language of the Tariff is explicit; and the ICC, in approving it, indicated that it deemed it only an expression of the common law. *Perishable Freight Investigation*, 56 I.C.C. 449, 483 (1920).

The Tariff makes it perfectly clear that the carrier has not undertaken an absolute liability "to overcome the inherent tendency of perishable goods to deteriorate or decay." His duty as to the perishables is to carry them in accordance with the shipper's directions, and in a manner free from negligence. The rules' reference is explicit: "the inherent tendency of perishable goods to deteriorate or decay"—not some specific peculiar defect that may exist in a particular shipment of fruits or vegetables. Respondent's contention that the Tariff only reflects the Bill of Lading exceptions is accordingly intelligible only if the "inherent vice" exception has the meaning we contend it has. It is the clear wording of the Tariff that should be taken as illuminating the meaning of the common law and the "inherent vice" exception; it would turn matters upside down to take the respondent's hazy contentions as to

the meaning of the "inherent vice" exception as casting a cloud on the clear and precise language of the Tariff.

(b) Alternatively, apparently recognizing that giving effect to the terms of the Tariff here would mean that the judgment below could not stand, respondent—and the Shippers' Associations—are forced to contend that the Tariff provisions are void as conflicting with the Carmack Amendment. (Res. Br. 7, 24; S.A. Br. 21). This argument fails on two grounds.

(i) The Tariff's language has stood for forty-four years as the considered judgment of the ICC as to the standard imposed by the common law. The language was formulated by the Commission itself, as an expression of the standard of the common law. See 56 I.C.C., at 483. It was first promulgated shortly after the adoption of the Carmack Amendment. As we demonstrated in our opening brief, it has been viewed as controlling by the Courts in numerous cases through the years. Countless shipments of produce have moved under it. It has never before been given any meaning different from that which we contend for. Under these circumstances, it is plain that the Tariff's language amounts to a controlling gloss on the common law—a conclusive proof of the meaning of the law's standard. See *Power Reactor Development Co. v. International Union*, 367 U.S. 396, 408 (1961); *United States v. Midwest Oil Co.*, 236 U.S. 459, 472-73 (1915); *Unemployment Comm'n v. Aragon*, 329 U.S. 143, 153-54 (1946); *Stuart v. Laird*, 1 Cranch 299, 309 (1803). Respondent's argument would undo over four decades of history.

(ii) Moreover, even if (contrary to our contentions) the Tariff were deemed to make some modification in

the common-law standard of liability, under the circumstances presented here that would not make it invalid. Shortly after the enactment of the Carmack Amendment, this Court made it clear that it was permissible to vary, by special contract or Tariff provision, the standard imposed by the common law, provided that the alteration did not go to the point of exonerating the carrier from liability for negligence. This Court observed: "The rule of the common law did not limit [the carrier's] liability to loss and damage due to his own negligence or that of his servants. . . . But the rigor of this liability might be modified through any fair, reasonable, and just agreement . . . which did not include exemption against the negligence of the carrier or his servants." *Adams Express Co. v. Croninger*, 226 U.S. 491, 509 (1913). And this principle—that modifications of the common law liability which did not purport to exempt the carrier from liability for negligence, were perfectly permissible under the Carmack Amendment—has been reiterated by this Court. *Missouri, K. & T. Ry. v. Harriman Bros.*, 227 U.S. 657, 672 (1913).⁹ The Protective Tariff here does

⁹ At the time of these decisions, §20(11) contained its present express provision that "no contract, receipt, rule, or regulation shall exempt such common carrier . . . from the liability hereby imposed." 226 U.S., at 504. The rationale of permitting a variation of the common law's provision for absolute liability, which did not exempt the carrier from liability for its negligence, is that the irreducible liability imposed by the statute itself is a liability for "any loss, damage, or injury to such property caused by it." (emphasis supplied). *Id.*, at 506; see *Trautmann Bros. Co. v. Missouri Pac. R.R.*, 312 F.2d 102, 104 (5th Cir. 1962). Thus a provision which retained the carrier's liability for negligence did not transgress the statute simply because it might exclude an absolute liability. 226 U.S., at 509-10. Thus the Court of Appeals for the Fifth Circuit has held, alternatively, that the standard

not purport to exonerate the carrier from liability based upon its negligence;¹⁰ and in this case, the carrier bore the burden of demonstrating its freedom from negligence.

II. RESPONDENT'S ASSERTION THAT A CARRIER SHOULD BE ABSOLUTELY LIABLE FOR THE SPOILAGE AND DECAY OF PERISHABLES IS WITHOUT FOUNDATION.

1. Respondent apparently suggests that, as a matter of public policy, the law should impose an absolute liability on a common carrier for the spoilage of perishable commodities in the carrier's possession. As we have stated, no court, except those below, has ever im-

of the Tariff is that of the common law, and that even if it varied the common law standard it would be valid. *Trautmann Bros. Co. v. Missouri Pac. R.R.*, *supra*, at 104; *Atlantic C.L. Ry. v. Georgia Packing Co.*, 164 F.2d 1 (5th Cir. 1947).

The so-called Cummins Amendments to the statute, c. 176,³⁸ Stat. 1196 (1915), and c. 301, 39 Stat. 441 (1916), which regulated provisions purporting to limit liability to less than the full value of the goods, retained the reference to "loss, damage, or injury . . . caused by it." (emphasis supplied). They were addressed only to the question of limitation on the liability for "full actual loss, damage, or injury" (emphasis supplied), and not to the matter of modifying the standard of liability. See also Uniform Freight Classification No. 4, Rule 1(b), discussed at A.A.R. Br. 15-19, 37-39.

In any event, it is impossible to say that the Tariff reduces the carrier's common law liability, since at common law a carrier had no obligation to furnish a refrigerated environment for the carriage of goods; and the Tariff only defines the terms under which the carrier will undertake this further responsibility.

¹⁰ The tariff under consideration in *Secretary of Agriculture v. United States*, 350 U.S. 162 (1956), involved a provision which totally excluded a certain amount of breakage from the carrier's responsibility, without regard to whether there was negligence on the part of the carrier. The tariff was not one which retained the carrier's liability for negligence within the area in which it operated. The case, then, turned on the question whether it could be said that the sort of breakage in question generally was a sort of damage not "caused by" the carrier. See 350 U.S., at 165, 166-67. The Court held that it could not, and accordingly the tariff was set aside.

posed such a liability; and it is foreclosed on three alternative grounds. The authorities we have cited establish that once the shipper has established its *prima facie* case, if the case is one of spoilage or decay of perishables, the burden is on the railroad to show its freedom from fault and its compliance with the shipper's instructions. Upon a finding that the railroad has carried such a burden, it is exonerated from liability for the spoilage.

The respondent would go further; it would make the railroad absolutely liable for the spoilage and decay, at least absent a showing of a nature which respondent—and the amici Shippers' Associations—never make clear. One thing is clear; in their view, a showing, where the loss is one of spoilage and decay, that the carrier has been free of negligence, and has followed the shipper's instructions, is not sufficient. It is apparent, then, that what respondent is contending for is a rule of absolute liability for spoilage; and the theory of its argument and that of amici Shippers' Associations is a frank contention for such a rule. (Res. Br. 28-34; S. A. Br. 26-34).

Respondent's contention is as ill-founded as a matter of public policy as it is as a matter of law. The effect of its adoption would be obvious. Fruits and vegetables begin the process of deterioration as soon as they are harvested. A shipper could deliver produce to a carrier that, although in good condition at the time of delivery, was close to the commencement of spoilage, and could collect if spoilage in fact occurred in transit. The respondent and the Shippers' Association, in an effort to blur this point, insist that the carrier can inspect at the point of shipment (Res. Br. 30-32; S. A. Br. 30). But the problem is not with the shipment of goods already in a spoiled condition; it is with the

shipment of fruits and vegetables that should be consumed more quickly than shipping them to a far-off destination will permit.¹¹ This clearly involves matters peculiarly within the knowledge and competence of the fruit and vegetable shippers, and as to which the carrier should not be an insurer. Even if this sort of condition were discernable through intensive tests and inspections by the carrier, the cost would be prohibitive. Moreover, much produce must be picked well before its peak in order to stand shipment to market;¹² and such produce often requires extensive and complicated processing, performed by agents of the shipper.¹³ This involves consequences basically within

¹¹ Sometimes colloquially called, if intentional, "selling a car of produce to the railroad."

¹² "You couldn't ship honeydew melons if you picked them on the vines when they were ripe." (R. 27) (testimony of witness for respondent).

¹³ In order to advance the maturation of the honeydew melons involved in the shipment in question, they were (in the middle of June in Rio Grande City, Texas) shut up by an agent of the shipper in a closed, unrefrigerated railroad car, and gassed with ethylene gas for a period of about four to five hours. During that time, it got very warm inside the car, and, as respondent's agent testified, "that is the way we want it" (R. 27). He said that while "I don't take no temperatures. . . it could easily go to a hundred degrees or more." (R. 28). After this treatment, the car was iced with 10,000 pounds of ice at Rio Grande City. The next morning, at Harlingen, Texas, the car was re-iced with 7500 pounds; and that evening, at Houston, a further re-icing of 7500 pounds was required. On the next day, in the evening, there was a further re-icing at Lexa, Arkansas, with 6600 pounds; the day after, one in the St. Louis terminal area with 3300 pounds; and the day after that, one at Chicago, with 3400 pounds. Obviously, the high temperatures caused by the artificial heat and gas treatment to the melons required very substantial quantities of ice in the early stages of the move. (R. 91-93).

Even the loading of the melons in the case at bar was the responsibility of the shipper. (R. 157).

the knowledge of the shipper and its agents; and it is another reason supporting the wisdom of the consistent course of common-law decisions in not imposing an absolute liability for spoilage and decay.

2. Moreover, the rule contended for by respondent would make a mockery of the eminently fair and reasonable provisions of the Tariff which permit the shipper to choose between a multitude of different protective services,¹⁴ and provide that "the duty of the carrier is to furnish without negligence reasonable protective service of the kind and extent so directed or elected by the shipper . . ." Under the plain language of the Tariff, "the carrier answers for his ship [car] and men, the cargo-owner for his cargo" and for the prescription of a means to preserve it. See *F. O. Bradley & Sons Ltd. v. Federal Steam Navigation Co. Ltd.*, *supra*; Pet. 52a. Under respondent's rule, the carrier would have no protection in meticulously following the instructions of the shipper who chose the protective service, and by performing its transportation services without negligence. Unless the carrier made some further showing—of a sort which respondent never defines—or unless he demonstrated some specific in which the shipper's instructions were at fault, he would be liable under respondent's theory for spoilage even where he strictly performed the protective

¹⁴ For example, the shipper here could have ordered a specified percentage of salt to be added to the icings so as to speed up the refrigeration process. (R. 90) There are great variations in the need for refrigeration. See *Perishable Freight Investigation*, 56 L.C.C. 449, 454, 468 (1920). The approach of the Protective Tariff is to leave to the shipper the judgment as to which should be employed with his produce; and to require only that the carrier follow those orders, and carry the goods in a nonnegligent manner.

services which the shipper requested, and demonstrated his freedom from fault. To state such a rule, in the context of perishable commodities, is virtually enough to show its unreasonableness. Small wonder that no common law court has ever previously applied it.

3. Finally, respondent—and the Shippers' Associations—speculating darkly as to a torrent of falsified and omitted records, argue that a standard based simply on the issue of negligence is unworkable and the carrier must be, accordingly, held to an absolute liability for spoilage. But it must be remembered that the carrier must bear the burden of proof as to his freedom from negligence, and as to his performance of the requested services. Circumstances casting doubt on the veracity of the carrier's claim to have met this standard may be given in evidence to the jury. The incompleteness of the carrier's records; the interest of the persons making the records; and the other factors which the respondent and the shippers' associations relate are matters which can hardly escape the jury's attention. And independent Government inspections or inspections by shippers' associations are a normal part of the shipping process, and are readily available to the shipper.¹⁵

Moreover the instant case is itself a refutation of the pretensions that the shipper is without the means to argue that the carrier's claim of freedom from negli-

¹⁵ The melons were inspected at destination by the Department of Agriculture (R. 173). This inspection was an essential part of the shipper's claim, and moreover, it furnished part of the basis for the shipper's argument concerning the operation of the fans during the course of the journey. See page 17, *infra*. The inspection provides information which could be very useful in refuting a carrier's claim to fault-free transportation. See the Inspection Certificate form reproduced at R. 173.

gence is not well taken. As detailed in respondent's brief, there was testimony which could have been construed as showing improper operation of the car fans during the course of the journey. (Res. Br. 28-29) The upshot of the matter, however, was that the jury did not draw this inference, but credited the carrier's explanation; it found that the petitioner had met its burden of proving freedom from fault and compliance with the shipper's instructions. Having failed to win its case before the jury, respondent now urges on this Court a rule which would make the carrier's proven freedom from fault and compliance with the shipper's instructions insufficient to avert liability for the spoilage.

Accordingly, the policy grounds suggested by the respondent and the amici Shippers' Associations are not well taken, even if there were reason to examine them in the face of the clear language of the Tariff, the law on the "inherent vice" exception, and the uniform current of adjudication on the standard of liability for the deterioration of perishables.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1963

No. 292

MISSOURI PACIFIC RAILROAD COMPANY, *Petitioner*

v.

ELMORE & STAHL, *Respondent*

**BRIEF OF ASSOCIATION OF AMERICAN
RAILROADS AS AMICUS CURIAE IN
SUPPORT OF PETITION FOR REHEARING**

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TABLE OF CONTENTS

	<i>Page</i>
I. Interest of Amicus Curiae	1
II. Argument	2
The Court's Erroneous Construction of § 20(11)	2
The Carrier's Burden of Proof	4
Possible Effect of the Opinion on Matters Not in Issue	7
Conclusion	9
Certificate of Service	10

TABLE OF CASES

	<i>Page</i>
Adams Express Company v. Croninger, 226 U.S. 491 (1913)	2-3
American Fruit Distributors v. Hines, 55 Cal. App. 377; 203 Pac. 821 (1921)	9
Galveston, Harrisburg and San Antonio Railway Co. v. Wallace, 223 U.S. 481 (1912)	6
Illinois Steel Co. v. Baltimore & Ohio Railroad Co., 320 U.S. 508 (1944)	4
Jonesboro, Lake City & Eastern Railroad v. Maddy, 147 Ark. 484; 248 S.W. 911 (1923)	8
Larry's Sandwiches, Inc. v. Pacific Electric Railway Company, 318 F.2d 690 (1963)	7
The Monte Iciar, 167 F.2d 334 (1948)	7
Missouri, Kansas & Texas Ry. Co. v. Harriman, 227 U.S. 657 (1913)	3
Schnell v. The Vallescura, 293 U.S. 296 (1934)	5-6
Southern Railroad Co. v. Barbee & Co., 190 Ky. 63; 226 S.W. 376 (1920)	8-9

TABLE OF FEDERAL STATUTES

Interstate Commerce Act, § 20(11), 49 U.S.C. § 20(11)	2, 7, 8
---	---------

RULES OF THIS COURT

Rule 42(2)	1
-------------------------	---

IN THE
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No. 292

MISSOURI PACIFIC RAILROAD COMPANY, *Petitioner*

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**BRIEF OF ASSOCIATION OF AMERICAN
RAILROADS AS AMICUS CURIAE IN
SUPPORT OF PETITION FOR REHEARING**

The Association of American Railroads hereby files its Brief as *amicus curiae* in this case, pursuant to Rule 42(2) of the Rules of the Supreme Court. The Brief is accompanied by written consent to its filing from the Missouri Pacific Railroad Company and Elmore & Stahl. These are all of the parties in the case.

I. INTEREST OF AMICUS CURIAE

The interest of the Association of American Railroads as *amicus curiae* is set forth on pages 1 through 3 of its Brief in Support of Petitioner on certiorari. Leave to incorporate herein by reference that statement of interest is respectfully requested.

II. ARGUMENT

The Court's Erroneous Construction of § 20(11).

The Court's interpretation of the shipping contract was influenced by its erroneous construction of § 20 (H) of the Interstate Commerce Act, 49 U.S.C. § 20(11), as making unlawful and void any contract modifying or affecting the standard of liability imposed by common law upon a carrier. That the common law permitted a carrier's liability, except for negligence, to be modified or affected by a valid contract is beyond dispute. The Court's decision, however, construes § 20(11) as having abolished this right of contract recognized by the common law. Such a construction of the statute is diametrically opposed to that made by this Court in *Adams Express Company v. Croninger*, 226 U.S. 491 (1913), pages 506, 507, 509, 511. This Court there stated that, at common law, the rigor of liability might be modified through any fair, reasonable and just agreement with the shipper which did not include exemption against the negligence of the carrier or his servants (page 509). Referring to the Carmack amendment, the Court stated that the statutory liability, aside from responsibility for the default of a connecting carrier, was not beyond the liability imposed by the common law as that body of law had been interpreted. With respect to the right to contract, the Court found the statute simply imposed the common law prohibition against a contract relieving the carrier of liability for its own negligence:

The statutory liability, aside from responsibility for the default of a connecting carrier in the route, is not beyond the liability imposed by the common law as that body of law applicable to carriers has been interpreted by this court as well as

many courts of the States. *Greenwald v. Barrett*, 199 N.Y. 170, 175; *Bernard v. Adams Express Co.*, 205 Massachusetts 254, 259. The exemption forbidden is, as stated in the case last cited, "a statutory declaration that a contract of exemption from liability for negligence is against public policy and void." This is no more than this court, as well as other courts administering the same general common law, have many times declared. (page 511) (emphasis supplied)

In the subsequent decision in *Missouri, Kansas & Texas Railway Company v. Harriman*, 227 U.S. 657 (1913), this Court construed the statute and its limitation upon the right of contract as follows:

The liability imposed by the statute is the liability imposed by the common law upon a common carrier, and may be limited or qualified by special contract with the shipper, provided the limitation or qualification be just and reasonable, and does not exempt from loss or responsibility due to negligence. (page 672)

The way in which this Court's construction of the statute influenced its interpretation of the shipping contract is ably presented in the Petition for Rehearing and we join in the presentation there made.¹ Not only was the

¹ In a footnote in the Petition for Rehearing the Court's attachment of significance to the fact that the same bill of lading is used for shipment of both perishable and non-perishable commodities is challenged upon sound grounds. That a separate bill of lading for perishables was unnecessary, since "... the conditions of the merchandise bill, supplemented by provisions which are more appropriate to tariffs than to bills of lading, will be entirely sufficient to take care of the transportation of perishable traffic" was explained in brief in *The Matter of Bills of Lading*, 52 I.C.C. 671. (Brief on Behalf of Carriers, page 8)

Court let to an erroneous and utterly meaningless interpretation of Rules 130 and 135 of the Perishable Protective Tariff, but it also nullified the very clear provisions of the Uniform Freight Classification providing for alternate rates depending upon the liability undertaken by the carrier. (cf. *Illinois Steel Co. v. Baltimore & Ohio Railroad Co.* 320 U.S. 508 [1944].) If, as the Court held, the carrier's liability must always be that imposed by the common law and can not be modified or affected by any provisions in the shipping contract, then we are at a loss to understand just what carrier liability the shipper would be purchasing if he elected to pay the higher rate provided in the classification.

The Court's decision that no contract can relieve a common carrier of liability for damage not caused by one of the enumerated exceptions recognized by common law is entirely contrary to the great weight of authority. (13 C.J.S. § 98; 20 A.L.R. 262, et seq.; 28 A.L.R. 503, et seq.; 45 A.L.R. 919, et seq.)

The Carrier's Burden of Proof

This Court's statement (Opinion, page 4) that the carrier, in order to overcome a shipper's *prima facie* case, has the burden of showing *both* its freedom from negligence and that the damage is due to an excepted cause relieving the carrier of liability, will be construed, in all likelihood, as overruling numerous prior decisions of the Court and was unnecessary to disposition of this case.² Prior decisions of this Court held

² In this case the carrier proved and the jury found the carrier had followed the shipper's instructions and had not been negligent. (TR. 177)

clearly that when a carrier, in answer to a *prima facie* case, established that the immediate cause of the damage was one excepted by common law or by contract, the burden rested upon the shipper to prove negligence or fault on the part of the carrier. Some of those decisions, which seemingly are overruled, are actually cited in support of the Court's present ruling. It is such citation that leads us to believe the Court failed to realize the full significance of its ruling.

The case of *Schnell v. The Vallescura*, 293 U.S. 296 (1934), is cited and quoted. This Court there stated that when a carrier has sustained the burden of showing that the *immediate* cause of the loss or injury is an excepted cause, the burden is then on the shipper to give evidence of the carrier's negligence, citing numerous prior decisions of this Court (pages 304-305). Even more pertinent to the case at bar is the Court's explanation of the burden of proof resting upon the carrier where the cargo is damaged by causes unknown or unexplained. In the case at bar the Court pointed out "it is apparent that the jury was unable to determine the cause of the damage to the melons" (Opinion, page 4). In other words, the melons were damaged by causes unknown or unexplained. In such a situation this Court took pains, in the *Vallescura* case, to explain the burden of proof as follows:

If he delivers a cargo damaged by causes unknown or unexplained, which had been received in good condition, he is subject to the rule applicable to all bailees, that such evidence makes out a *prima facie* case of liability. It [the *prima facie* case] is sufficient, if the carrier fails to show that the damage is from an excepted cause, to cast on him the further burden of showing that the damage is not due to

failure properly to stow or care for the cargo during the voyage. (page 305)

Thus, only where the carrier *failed* to show that the damage was from an excepted cause did the *prima facie* case impose the burden of showing that the damage was not due to its negligence. Conversely, a showing that the immediate cause of the damage was one excepted by common law or contract relieved the carrier, in its answer to the *prima facie* case, of the further burden of showing that the damage was not due to its negligence.

The case of *Galveston, H. & S. A. Ry. Co. v. Wallace*, 223 U.S. 481 (1912), is cited. In that case the shipper had established a *prima facie* case by showing delivery of his goods to the carrier and the carrier's failure to deliver at destination. This Court explained the burden of proof resting upon the carrier as follows:

The burden of proof that the loss resulted from some cause for which the initial carrier was not responsible in law or by contract, was then cast upon the carrier. . . . If the failure to deliver was due to the act of God, the public enemy or some cause against which it might lawfully contract, it was for the carrier to bring itself within such exception. (page 492)

Implicit in this language is recognition that if the carrier had shown that the loss resulted from a cause excepted by law or contract the shipper's *prima facie* case would have been overcome.

We do not believe it was intended to overrule these and numerous like decisions of this Court. So well established was this rule with respect to the burden of proof that the Court of Appeals, 3rd Circuit, in 1948,

characterized as a "novel proposition" the argument that a carrier, in order to overcome a *prima facie* case, must prove both its exercise of due care and that the damage arose from an excepted cause. *The Monte Iciar*, 167 F. 2d 334 (1948), at page 337.

The breadth of the ruling is unnecessary in disposing of the conflict between the opinion of the Supreme Court of Texas in this case and the opinion of the United States Court of Appeals for the 9th Circuit in *Larry's Sandwiches, Inc. v. Pacific Electric Railway Co.*, 318 F. 2d 690 (1963). The conflict between the two opinions lay in the Court of Appeals' view that having established its freedom from negligence and compliance with the shipper's instructions, the carrier need not prove an excepted cause, while the Supreme Court of Texas was of the view that unless an excepted cause is established the question of the carrier's negligence is immaterial. Neither of the opinions dealt specifically with the burden of proof on the question of negligence when the damage is shown to have resulted from an excepted cause.

The previous decisions of this Court, that, in answer to a *prima facie* case, where the carrier has established an excepted cause, the carrier does not have the additional burden of establishing its freedom from negligence, should remain controlling and should not be overruled by this Court in its resolution of the conflict between the opinions referred to.

Possible Effect of the Opinion On Matters Not In Issue

In light of its interpretation of the particular shipping contract here involved, the breadth of the Court's construction of § 20(11) of the Interstate Commerce

Act is unnecessary to disposition of this case. Its construction of the statute is such as to affect vitally the rights and obligations of carriers and shippers in matters and areas not in issue in this case. For instance, the Uniform Domestic Bill of Lading, a part of the record in this proceeding, provides that the carrier shall not be liable for country damage to cotton or for damage or loss resulting from riots or strikes. We doubt that damage resulting from any of these would be considered damage caused by the act of God, the public enemy, the act of the shipper himself, public authority, or inherent vice or nature of the goods. (See citations, *infra*.) Nevertheless, the Court now says that the carrier is liable for any loss or damage which the carrier cannot show to fall within the exceptions enumerated by the Court as being recognized by the common law. Further, the Court says that no valid contract can be made that would relieve the carrier of this common law liability, that is, liability for any loss or damage not shown to have been caused by the particularly enumerated exceptions.

Thus, the contractual provision of non-liability for loss or damage resulting from riots or strikes may be made questionable by the Court's opinion because not falling within the enumerated exceptions recognized by the common law.

Shipping contracts providing that a common carrier shall not be liable for damage resulting from numerous causes, other than its own negligence, not falling within the enumerated common law exceptions have been held valid, both at common law and under § 20(11) of the Interstate Commerce Act. *Jonesboro, Lake City & Eastern Railroad v. Maddy*, 147 Ark. 484; 248 S.W. 911 (1923) [damage resulting from strike]; *Southern*

Railroad Co. v. Barbee & Co., 190 Ky. 63; 226 S.W. 376 (1920) [damage resulting from riot and fire]; *American Fruit Distributors v. Hines*, 55 Cal. App. 377; 203 Pac. 821 (1921); 13 C.J.S. § 98; 20 A.L.R. 262, et seq.; 28 A.L.R. 503, et seq.; 45 A.L.R. 919; et seq.

Perhaps the language of the last paragraph of the footnote on page 8 of the Court's opinion is intended to preserve the lawfulness and validity of contractual provisions such as those to which we have referred. But a reading of the entire footnote, together with the body of the Court's opinion, raises questions whether in the area of carrier liability there has been preserved any measure of the contractual right recognized at common law.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the Petition for Rehearing be granted.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing brief has this day been served on each party to this case by mailing copies thereof to the respective counsel of record at their post office addresses, first-class mail, postage prepaid.

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May 29, 1964.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1963

No. 292

MISSOURI PACIFIC RAILROAD COMPANY, *Petitioner*,

v.

ELMORE & STAHL, *Respondent*.

On Writ of Certiorari to the Supreme Court of Texas

PETITION FOR REHEARING

Petitioner, Missouri Pacific Railroad Company, respectfully prays that this Court grant rehearing of its decision of May 4, 1964, affirming the judgment of the Texas Supreme Court in the above entitled case.

REASONS FOR GRANTING A REHEARING

The fundamental error in the Court's decision, we submit, stems from its expressed view that the standard of liability imposed at common law cannot be modified or affected in any fashion by a tariff provision which is a part of the shipping contract. (See page 4, Slip Opinion.)

This declaration is flatly at variance with the prior holdings of this Court. In *Adams Express Co. v. Croninger*, 226 U.S. 491, 509 (1913), the Court made it perfectly clear that it was permissible to vary, by

special contract or tariff provision, the standard imposed by the common law, provided that the variance did not go to the point of exonerating the carrier from liability for negligence. As the Court stated: "The rigor of this liability [the so-called "absolute" liability] might be modified through any fair, reasonable, and just agreement . . . which did not include exemption against the negligence of the carrier or his servants." The Court's declaration likewise is at variance with *Missouri, K. & T. Ry. v. Harriman Bros.*, 227 U.S. 657, 672 (1913). The authorities cited by the Court (Slip Opinion, p. 4) do not alter the holding of *Adams Express Co.*, *supra*.¹

While we contended on the argument of this case that the common law itself was fully in accord with the proposition we contended for—that in the case of spoilage of perishables, the carrier's burden is to prove its freedom from negligence and its compliance with the shipper's instructions—the Court has held against us on this point, and this holding is not the point of our contention in this petition. However, we submit (i) that Rules 130 and 135 of the applicable Perishable Protective Tariff No. 17 clearly incorporate the rule we contend for; (ii) that these tariffs prescribe the con-

¹ In *Cincinnati, New Orleans & Texas Pacific Railway Co. v. Rankin*, 241 U.S. 319 (1916), the Court held valid a provision in the bill of lading limiting the carrier's liability on the basis of a valuation declared by the shipper in consideration for a reduced rate of carriage. In *Boston & M.R.R. v. Piper*, 246 U.S. 439 (1918), the Court ruled only that "the principle that the carrier may not exonerate itself from losses negligently caused by it" precluded a provision in the bill of lading "limiting liability from unusual delay and detention, caused by the carrier's negligence, to the amount actually expended by the shipper in the purchase of food and water" for livestock during the period of delay.

ditions under which carriers accept perishables for transportation and define the standard of care required of the carrier;² (iii) and that if these rules are viewed without the Court's erroneous assumption that it is impermissible to vary the common law liability in any respect, a contrary result to the Court's holding is indicated.

The language of Rule 130 is clear and precise: The carrier does not "undertake to overcome the inherent tendency of perishable goods to deteriorate or decay, but merely to retard such deterioration or decay insofar as may be accomplished by reasonable protective service, of the kind and extent requested by the shipper, performed without negligence." And Rule 135, specifically addressed to the "liability of carriers," provides that "The duty of the carrier is to furnish without negligence reasonable protective service of the kind and extent so directed or elected by the shipper . . ."

The application of these rules to the present case is also clear. This is incontestably a case of "perishable goods" which "deteriorated or decayed." Here the carrier's obligation, it is specifically stated in the Rules, was simply to retard the deterioration or decay insofar as might be accomplished by performing the

² The Court felt it "significant that the identical bill of lading is used for the shipment of both perishable and nonperishable commodities . . ." (Slip Opinion, p. 8, n. 15). However, in the case of perishables, the bill of lading incorporates by reference the provisions of the Perishable Protective Tariff; these tariffs are inapplicable to nonperishables. In short, the shipping contract in the case of perishables is not the same as the shipping contract involving nonperishable goods.

protective services as ordered by the shipper (as the jury found); and by performing the transportation services without negligence (as the jury also found).

The meaning of this tariff is plain; reference to the more generalized standard of the common law (see Slip Opinion, page 7) only serves to make it less clear. If anything, the Rule's precise test should have been used to interpret the common-law rule and its exceptions, rather than the common law used to interpret the rule. Whether, as was urged in dissent, this tariff be viewed simply as a particularization or application of the exceptions established at common law, or whether it be viewed as making a modification in the common law, its meaning is clear—the carrier is not liable for deterioration of perishables if it has prudently performed the protective services and all other duties. There is no reason, under the previous holdings of this Court, why it should not have been given literal effect.

Had the Court approached these tariff rules without the assumption that the tariffs could do no more than reflect, without alteration or even without further specification, the rule of the common law, we submit that it would have given the tariffs their plain effect, which would clearly have absolved the carrier from liability. It would not have ignored the tariffs altogether—which was the logical consequence of the Court's view of what the tariff Rules might accomplish, i.e., nothing.

The Court's decision in this case accordingly turns on a major premise which is flatly at variance with prior decisions of the Court. That major premise is that it is totally impermissible for a tariff to vary the

common law standard in any respect.² As we have shown, this major premise is flatly contradicted by prior holdings of the Court.

Because the Court's entire rejection of the literal meaning of Rules 130 and 135, controlling in this case, turns on this premise, we respectfully request that this petition for rehearing be granted.

Respectfully submitted,

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² At common law, a carrier was answerable for damage caused to a shipment by the acts of a mob or resulting from a strike. See authorities collected in Anno, 20 A.L.R. 262. The Uniform Straight Bill of Lading, applicable to the shipment in the present case, stipulates, however, that except in case of negligence, the carrier shall not be liable for damage resulting "from riots or strikes" (Tr. 150, Para. 1(b)). If, as the Court holds in the present case, the carrier is liable unless it can show that the damage resulted from one of the five excepted causes (Slip Opinion, p. 3) a cloud would be cast upon this provision in the bill—a provision which, so far as we are aware, has not been seriously questioned in 40 years.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

ABE KRASH

Counsel for Petitioner